(1) Supreme Court, U.S.
FILED
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No. _____

In The

Supreme Court of the United States

Rafael Náter,
Petitioner

v.

Richard Riley, Secretary of the Department of Education,
Respondent

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

Rafael Náter
Pro-se Petitioner
31 Zuania,
Parque de Villa Caparra,
Guaynabo, Puerto Rico 00966
(787) 781-4089

117 pp

Petition For Writ Of Certiorari.

a) Questions Respectfully Presented For Review.

Petitioner appealed to the Merit Systems Protection Board (the Board). This revolved about discrimination and whistleblowing activities. The Board dismissed because lack of jurisdiction; however, did not inform petitioner as required under 5 C. F. R. 1614.302(b). The Federal Circuit Court consolidated the petitioner's four appeals because all arise from the same operative facts. After the respondent motion to dismiss, the Court transferred one case to the District Court of Puerto Rico and decided the other three cases.

1) If, based on lack of compliance with 5 C. F. R. 1614.302(b), the Circuit Court should have transferred all the cases; or, alternatively, remand to the Board to review the EEO issues?

In reference to the judicial review of decisions by the Merit System Protection Board (Board) as established under 5 U.S.C. § 7703:

2) Did the case presented the statutory elements to set aside the Board decision; 5 U.S.C. 7703(c)?

b) Parties To The Proceeding. All parties to the proceeding are included in the caption. No corporate disclosure statement is require.

Petitioner is: Rafael Náter, pro-se
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Guaynabo, Puerto Rico 00966.
Tel. (787) 781-4089.

Respondent is: Richard Riley, Secretary
United States Department of Education
[1] was represented by: David B. Stinson, AUSA
Department of Justice, Room 12040
"L" street N.W.
Washington, D.C. 20530
Tel. (202) 307-0290 / (202) 616-0391

Note: Following with rule #29.4 of this court, the documents will be serve on the Solicitor General of the United States. Nevertheless, a "Courtesy Notice" will be serve on the representative at the lower courts: David B. Stinson and Fidel Sevillano Del Río.

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[1] The agency's attorney, Anthonier White, Esq., represented the agency for all practical purposes before the Board and before the Circuit and the District Court for Puerto Rico - District case 99-1366 (JP). Address is: U.S. Education OGC division, 600 Independence Ave., S.W., Room 4200, Washington D.C. 20202-2110. Tel. (202) 401-6700. The official attorney before the District Court is Fidel Sevillano Del Río, AUSA. Address: Federal Office Building, Room 452, Carlos Chardón street, #150, Hato Rey, Puerto Rico 00918. Tel. (787) 282-1844.

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	Date	Opinion/Order	Docket No.
	-By the Merit System Protection Board:		
A	18/Dec/1997	Initial Decision	NY-1221-96-0334-W-1.
B	12/May/1998	Order: No Stay	NY-1221-98-0272-S-1.
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E	31/Dec/1998	Initial Decision	NY-1221-98-0401-W-1.
F	02/Mar/1999	Initial Decision	NY-1221-98-0272-W-1.
G	18/Mar/1999	Initial Decision	NY-0752-98-0297-I-1.
	-By the United States Court Of Appeals - Federal Circuit:		
H	09/May/1999	Judg'nt/Opinion	99-3083, -3143, -3213.
I	06/Jul/2000	Rehearing Denied	99-3083, -3143, -3213.
	-By the United States District Court - Dist. Of Puerto Rico:		
J	14/Sep/2000	Judg'nt/Opinion	99-1366 (JP).

(II). Other Relevant Material.
K. Selected section of "Opposition to Defendant's Motion For Dismissal And for Summary Judgement"; docket #63, case 99-1366 (JP) - D.C.P.R.
L. Petition For Review [to MSPB] docket: NY-1221-96-0334-W-1
M. "Petitioner's Statement Concerning Discrimination" - Filed with the Federal Circuit under case 99-3083.

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d) Opinions And Orders Entered In The Case.

It is noted that the administrative orders and Court opinion are not published, but will appear on tables on the official reports. In chronological order, the Opinions Below:

(i) The decision by the Merit System Protection Board appears at Appendix A to the petition; it is unpublished. This decision was issued by the Board on December 18, 1997, docket: NY-1221-97-0334-W-1; disposition: Corrective action was denied.

(ii) The order by the Merit System Protection Board appears at Appendix B to the petition; it is unpublished. This order was issued by the Board on May 12, 1998, docket: NY-1221-98-0272-S-1; disposition: Stay Request is denied.

(iii) The order by the Merit System Protection Board appears at Appendix C to the petition; it is unpublished. This order was issued by the Board on November 3, 1998, docket: NY-1221-97-0334-W-1; disposition: Petition For Review was denied.

(iv) The order by the Merit System Protection Board appears at Appendix D to the petition; it is unpublished. This order was issued by the Board on November 23, 1998, docket: NY-1221-98-0401-W-1; disposition: Request for Hearing is denied; the Board lacked jurisdiction.

(v) The decision by the Merit System Protection Board appears at Appendix E to the petition; it is unpublished. This decision was issued by the Board on December 31, 1998, docket: NY-1221-98-0401-W-1; disposition: Dismissed; lack of jurisdiction.

(vi) The decision by the Merit System Protection Board appears at Appendix F to the petition; it is unpublished. This decision was issued by the Board on March 2, 1999, docket: NY-1221-98-0272-W-1; disposition: Dismissed; lack of jurisdiction.

(vii) The opinion and judgement of the United States court of appeals appears at Appendix H to the petition; it is unpublished. This order was issued by the Federal Circuit appeal court on May 9, 2000, docket: 99-3083, 3143, -3213; disposition: The Board decision was Affirmed.

(viii) The latest order of the United States court of appeals appears at Appendix I to the petition; it is unpublished. This order was issued by the Federal Circuit appeal court on July 6, 2000, docket: 99-3083, 3143, -3213; disposition: Rehearing Denied.

e) Jurisdiction Of The Supreme Court.

Please note that:

(A) Original Judgement by the United States Court of Appeals was on May 9, 2000.

(B) A timely petition for rehearing was denied by the United States Court of Appeals on July 6, 2000, and a copy of the order denying rehearing appears at appendix I.

Petitioner believes this Honorable Court has jurisdiction as authorized by our Constitution, U.S. Const. art. III, §2, and per the statutory provisions under 28 U.S.C. § 1254(1).

f) Constitutional And Statutory Provisions Involved.

We believe there are two main statutory or regulatory provisions involved:

5 U.S.C. 7703: **Judicial review of decisions of the Merit System Protection Board**. Sub-section (c) set the elements needed by the appeal court to set aside any agency action, findings, or conclusions.

and;

5 C.F.R. 1614.302(b): Equal Employment Opportunity Commission, Federal Sector, Subpart C - Related Processes: **Mixed Case Complaints**. Sub-section (b) establishes the process to follow by the employee and by the agency.

g) Statement Of The Case.

This is truly ONE case and it is a Mix Case. Náter, here the Petitioner, alleged discrimination and reprisal because protected disclosures. In substance, Petitioner, born, raised, and worked for the Respondent office in Puerto Rico, alleges discriminatory treatment against him and members of the office of P.R., and against certain auditees; this because national origin and political preferences. Also, Petitioner alleges he detected and reported irregularities in the Respondent's methods to perform audits, investigations, and in the prosecution of possible offenders. Additional allegations were included at District Court level mostly based on the Federal Tort Act..

h) Reasons For Granting The Petition.

The importance of this case, for National purposes, may strive of

the misapprehension of facts itself. Please note that, whenever the trial Court (either administrative Court as it is the Board, or the District Court) has determined that a series of allegations are the facts of the case, but, this in conflict with stronger and more probable allegations of facts, then, the results are in conflict with the reality, against justice, and against the purpose of our system.

The Proceedings In Relations To The Issues.

1) If, based on lack of compliance with 5 C. F. R. 1614.302(b), the Circuit Court should have transferred all the cases; or, alternatively, remand to the Board to review the EEO issues?

The course of the proceeding has been complicated because the facts of the case, and the laws and regulations governing the allegations. In summary, the following procedural facts are relevant.[2]

In compliance with 5 C.F.R. 1614.302, Náter filed a Mix complaint with the agency EEO division, but action was not taken. After the allowable time lapsed, he followed with the process and filed a Mix Case Appeal before the Merit System Protection Board (the Board). See appendix (adx) J, at 7 to 9. While this case was in process, additional personnel actions were taken against Náter and he initiated another action which ended in a second appeal of three personnel actions. This second appeal was broken by the Board into three individual appeals. Among other, Náter claimed discrimination and reprisal for protected disclosure on each appeal. (**adx J** at 7 to 9).

For the first appeal, and after a jurisdictional hearing (November 14, 1996), the relief requested was denied; it is noted that the Board refused to review the allegations of discrimination or any other, excepted for the allegation of reprisal due to protected disclosures. Then, a PFR (Petition For Review) before the board was also denied. See **adx A** and **B**. It is noticed that **neither the Board nor the agency-respondent ever notified Náter about his right to file with the agency EEO counselor or to request a final decision from the agency as required under 5 C.F.R. 1614.302(b).**

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[2] For illustrative purposes, see the September 14, 2000, order by the District Court of Puerto Rico (D.P.R.) at our **appendix (adx) J** at 7 to 9: Uncontested Facts as determined by the Court. However, petitioner controverted some of these alleged facts.

Then, Náter filed appeal with the EEOC and simultaneously PRF with the Federal Circuit. The EEOC did not accept review based on lack of jurisdiction, and Náter filed Civil Action in the Federal District Court. (**adx J**).

For the other three personnel actions, which ended in three individual appeals: The Board, and without any hearing, dismissed two appeals for lack of jurisdiction; also, did not review the allegations of discrimination. Then, on the last appeal, sustained a hearing and reviewed the discrimination based on national origin, and the reprisal due to disclosures. (**adx G**). It is noticed that, in relation to the two appeals dismissed without a hearing (**adx C** to **E**), **neither the Board nor the agency-respondent ever notified Náter about his right to file with the agency EEO counselor or to request a final decision from the agency as required under 5 C.F.R. 1614.302(b).**

Because all four appeals were based on the same operative facts, Náter asked the Federal Circuit Court of Appeals to consolidate all the four cases, and the Court granted the motion. This became case no. 99-3083, -3143, -3213, -3236. (**adx H**). Náter had also included the cases as part of the Civil Action before the D.C.-P.R. (District Court for Puerto Rico), case 99-1366 (JP). (**adx J**). This latter case was filed on April 6, 1998.

It is important to note that, at all times, Náter openly and with candidacy informed both, the Federal Circuit, and to the District Court the status of his action. More important, Náter clearly and expressly informed to the Federal Circuit his intention of preserving his allegations of discrimination. (**adx L**).

Under this scenery, respondent asked the Federal Circuit to dismissed all cases because petitioner filed the same actions before the D.C.-P.R., and Náter informed the Court of his desire to preserve his allegations of discrimination. The appeal Court did not dismissed the cases, but transfer ONE case to the District, this was the last appeal, and reviewed the other three cases. Finally, the appeal Court sustained the agency, this, on May 9, 2000, and later denied Petition for Rehearing, July 6, 2000. (**adx H, I**).

The District Court sustained two Scheduling Conferences, and, in response to defendant's motion to dismiss, on September 14, 2000,

the Court dismissed all the allegations, excepted one. The District transferred back to the Federal Circuit the case received from the Federal Circuit, this, the allegation related to whistleblowing..

Náter filed "Notice of Appeal" with the First Circuit Court of Appeals on September 19, 2000, in relation to the dismissed allegations.

Note: *We also are filing a motion with this Honorable Court to praying for a "Continuance" of the proceedings or for "Dismissal Without Prejudice To Re-file" until after the First Circuit and the Federal Circuit completion of this case review. Please notice that we are compelled to filed this action at this moment as required by the law and rules (see rule 13 of this Honorable Court). After the Circuits review is completed, if applicable, we will ask for consolidation of the cases.*

Further, as a last alternative, we ask this Honorable Court to review the whole case as it may be applicable according to Taylor v. McElroy, 360 U.S. 709 (1959). In Taylor, this Court decided that the issues before the Circuit were very similar to the issue properly before them, thus, review the case.

Wherefore, very respectfully, we poses that this case should have been review as one case and should have been transferred in full to the District Court for a "De Novo" review as stated in 5 U.S.C. 7703(c); *"... except that in the case of discrimination brought under any section referred to in (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court."*

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2) Did the case presented the statutory elements to set aside the Board decision; 5 U.S.C. 7703(c)?

Specifically, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be:

"... (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence; ...

The substance in this second *Question* relates to one fact: On February 23, 1998, Petitioner did submit to the Board with his Petition For Review (PFR) all related documents, arguments and motion identified as New And Material Evidence. Petitioner alleged that such new evidence may have resulted in the revocation of the Board initial decision, or at least, in remand to the Board for additional review. The Board, however, understood those documents were submitted on April 7, 1998, as part of petitioner's reply to the agency. The Federal Circuit Affirmed. Then, the argument revolves around the effects of this misapprehension by the Board and by the Circuit.

The Honorable United States Court of Appeals for the First Circuit appears to have misapprehend certain substantive facts and to have misapplied the law in this case. Therefore, some very important elements of the cause of action were not considered, and the process itself appears to have been misapplied against the Petitioner.

In relation to case no. 99-3083, -3143, -3213, the Federal Circuit opinion should be revoked based on these considerations.

Very respectfully, Náter poses that the Federal Circuit appears to have overlooked the fact that his PFR (Petition for Review) with the Board was filed within the allowable time. Please note that this PFR included the "New and Material Evidence" which was at issue, also, Petitioner made reference to the appendix at A-465, A-456. (This, in reference to the appendix submitted to the Fed. Cir.)

The Federal Circuit determined that:

> *"... Additionally, although Náter badly claims* ***that his untimely filing contained new and material evidence****, he fails to demonstrate why he was unable to submit this evidence despite due diligence before the record closed twenty-five days after Náter served the petition for review. Thus, the AJ's decision was supported by substantial evidence."* See **adx H** at 7, 1st ¶.

The Board issued the I.D. (Initial Decision) on December 18,

1997 (ADD-1)[2], and they granted permission for, and Náter did file the PFR on the February 23, 1998 (**adx L**). This PFR included an explanatory motion together with the new and material evidence obtained after the hearing record closed (A-456). Please note that per 5 C.F.R. 1201.58(a) the HEARING record closed the last day of the hearing; in this case, November 14, 1996.

On November 3, 1998, the Board issued the Final Decision denying Náter's PFR because: " ... *it does not meet the criteria for review as set forth in 5 C.F.R. 1201.115.*" Additionally the Board stated that: " ... *After the close of the record on petition for review, 5 C.F.R. 1201.114(i), the appellant submitted a reply to the agency's response to his petition for review; the Board has not considered this reply because the appellant has not shown good cause for his delayed filing.*" See **adx C**. Please note that neither the agency nor the Board ever addressed the arguments posed by Náter in the February 23, 1998 motion nor addressed or rebutted the materiality of the new evidence he presented.

Náter filed timely PFR before the Circuit Court alleging, in summary, the Board erred: (a) by not taking into consideration Náter's reply to the agency's response, and (b) by making a determination that Náter's PFR did not meet the indicated criteria for review resulting in their denial of the PFR.

However, it is apparent the Court overlooked and did not address the second issue (issue (b) above), and it is apparent both issues were mixed up. At pages 5 (last ¶), p. 6 (last ¶), and p. 7, the Court addressed Náter's first allegation (the Board did not consider his reply) and sustained the agency determination, **adx H** at 5 to 7; unfortunately, the Court did not indicate if his PFR met or not the criteria per 5 C.F.R. 1201.115.

The Court misapprehended Náter contention ("... *Náter contends that ... (3) Náter's reply brief contained new and material*

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[2] Please note that our references the appendix in this document are indicated as **adx**. Reference to the appendix before the Fed. Cir., and to the PFR before the Board are included as illustrative only - the documents are not here included.

in "parenthesis" are for documents included in the Court or agency below; references to the appendix in this Petition for Writ of Certiorari are not.

evidence.", **adx H** at 6, 1st ¶), and misapprehended as a fact that the New and Material Evidence was submitted as part of the reply (April 7, 1998) rejected by the Board (id. at 7, 1st ¶). Apparently the Court understood that Náter was intending to submit the New and Material evidence as part of the April 7, 1998 reply, but the fact is that the new evidence was submitted on February 23, 1998. With very much respect, we poses the determination is not correct.

This is, Náter did not content that his reply included the new material. This material was timely submitted and explained on February 23, 1998, as part of the PFR ((A-465(a) at item #3, A-456)). See **adx L**.

But these facts do not put an end to this issue; the Board denied the PFR after determining that it did not meet 5 C.F.R. 1201.115. But the facts are in conflict with that determination. Náter's BRD-PFR included objections and referencing to supporting material on record and to laws (A-472 to A-475). Also, petitioner included the allegation that the new evidence was not available before the close of the record for the hearing[3], since most of the documents were created after November 14, 1996.

Also, in support for our pray, please note the following: The Circuit Court sustained the Board decision by indicating that substantial evidence support the Board's conclusion[4]. However, the new evidence (A-456 to A-464, and as part of the Brd-PFR at tab-3) appears to be of substantial weigh to make a reasonable person believe that it is more probable than not that all those "Superior" ratings for Náter were obtained against the will of Ríos, the main subject of Náter disclosures, and after the assistant to the supervisor ignored Ríos requests. Also, the new evidence provides a strong indication that Ríos was able to strongly influence the assistant supervisor and the rating official only after Náter filed the report of

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[3] November 14, 1996 (A-456 to A-464); see 5 C.F.R. 1201.58(a)),

[4] "... *We hold that substantial evidence supports the Board's conclusion that Náter's 1990 disclosure was not a contributing factor in the agency's alleged lowering of his 1994 performance appraisal. Even assuming, as Náter alleges, that he continuously reported auditing irregularities between 1990 and 1994, his higher performance ratings between 1990 and 1993 belie his contention that the agency acted in reprisal for these alleged disclosures or for his 1990 disclosure involving the credit card misuse.*" Adx H at 6, 2nd ¶.

irregularities with the agency and later with the Special Counsel (OSC).

As to the "contributing factors", the Circuit concluded that Náter's high performance evaluations from 1990 to 1993 belie his contention that his 1994 rating was in reprisal for his continuous disclosure during the same period. (Adx H at 6, 2nd ¶) But the new evidence brings additional light in this area. This is, Ríos wrote a memo ("new evidence", A-045) disclosing his ill feelings against Náter immediately after Náter transfer-in during 1990. Also, this shows Ríos continuous opposition to Whiting and other supervisors' evaluating Náter performance as outstanding (see A-046, 2nd ¶). Further, this document is indicative of Ríos knowledge of Náter disclosures which at the same time is indicative that his 1994 rating and succeeding personnel actions were in reprisal for Náter's allegations of violations to the rules and regulations applicable to the agency.

Therefore, the new evidence (all were timely filed) brings facts which are in direct conflict with the facts previously relied on for the determinations in the Board's I.D. (**adx A**). I pose that the new facts should result in the revocation of the I.D., or at least to order that a new hearing be sustained in the specific areas of conflict, and that a new period for discovery be opened for these purposes.

Additionally, the Federal Circuit Appeal Court holds that the Board did not abuse its discretion in declining to consider Náter's untimely filing (in reference to his reply to the agency response) (**adx H** at 6, 4th ¶); and further, also stated that there is no right for such a reply (*Id.* -7,1st ¶). Very respectfully the Court may have overlooked one important fact; i.e., **it was the response by the agency which was late, Náter filed timely.**

The regulations do not specifically provide the opportunity nor the right to reply to the agency response (**adx H** at 7, 1st ¶). However, please note the following facts.

The Federal Rules of Appellate Procedures and the local rules for the District Court of Puerto Rico can be enlightening, this regardless the Board[5] have not adopted the specific rules.

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[5] The Board rules at 5 C.F.R. 1201.55 established the requirements for submission of motions and the time to file an objection to motions. The time is 10

As to filing and service, Fed. R. App. P. 25(b) requires: "... *Unless the rule requires service by the clerk, a party must, **at or before** the time of filing a paper, serve a copy on the other parties to the appeal or review.*" The local rule 311.3 for the U.S. Dist. of Puerto Rico similarly requires service to all parties "... ***on or before** the date that they are filed with the Clerk, ...*" (RH-ADD-10).

In the case at bar, the agency dated and certified as served their response on March 20, 1998; i.e., the last date for filing. However, Náter controverted (i) the accuracy of the mailing date and (ii) claimed it was **not** mailed to "... the last known address ..." (PFR-9)[6]. Based on the agency responses, they have never controverted or rebutted Náter's allegations, thus, we should presume the facts are as Náter alleges. Therefore, the effective filing date by the agency was April 2, 1998, which means it was a late filing.

Also, in this regards, we also may look at the "Board's Certify Index"; (ADD-17, item #6), the agency response was recorded on March 25, 1998, but the last date for filing was March 20, 1998. This fact is also indicative that the response was filed late even with the clerks' office.

Then, should we ask about the relevancy of these issues and facts? It is a fact the Constitution requires, among others, a "Due Process". The administrative process is permeated with that same idea. In our case, the issue is, why it is required that documents be

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days after service of the motion. The Board's policy is that the rules will apply in a manner that expedites the processing of each case, with due regard to the rights of all parties. We pose that the Federal Rules of Civil Procedures should serve as guidance and be applied whenever the conditions so indicate.

Service requirements per rule 5 of the Federal Rules of Civil Procedures (see 28 U.S.C. Rules, R. 5) is similar to the indicated rule from the Board. In essence, both type of rules requires that all documents must be serve upon all parties and to the last known address and must include a Certificate of Service informing the name, address, and date served.

[6] With his reply, Náter notified the Board he received the answer on April 2, 1998, that the envelope was not having any Post-Office stamp, symbols, or marks, and it was addressed to his previous address (Náter adopted and informed a new address since October 1996). This is, since there were not any post-marks, then, for making a determination as to the date the response by the agency was filed, the only date we are having is April 2, 1998. Then, since March 20, 1998 was the last date to file response, but was effectively file on April 2, 1998, their response should have been rejected.

served on the other party and that the certificate of service informs the date served if it is not for granting a true and reasonable opportunity to reply or rebut the assertion in the document served? There is no other answer; the purpose is to allow the opposing party the true and fair chance to rebut adversary statements.

Then, the substance of these arguments is to sustain that under the conditions indicated, Náter was not afforded a true and fair opportunity to rebut the allegations by the agency in their response. Even more, the agency response was filed late and as such should have been rejected, but it was accepted and reviewed. But Náter's reply after 5 days of receiving of the agency response, was rejected.

Based on these facts, we pray this Court reconsideration of the decision as prayed for in the PFR.

In Relation To The Allegations Of Whistleblowing.

The Federal Circuit Appeal Court decided to decline Náter invitation to partially overrule Carter v. DOA, 62 M.S.P.R. 393 (1994) (adx H at 6, 3rd ¶, last sentence). Also, as to cases 99-3143, and 99-3213, the Court upheld the Board's conclusion that the alleged Whistleblowing activities were no more than "professional disagreements" (adx H at 6, 3rd ¶ and *id.* at 7). However, it is apparent that we have deviated our attention from the main issue. We posed that for all three cases the issue is to determine what happens when the employee makes a number of related disclosures based upon the same operative facts, some of which are argued to come under 5 U.S.C. 2302(b)(8), and others under Section 2302(b)(9).

We poses that the applicable standard to this case was set in Martin v. DAF, 63 M.S.P.R. 574 (1997)[7]. On review, the Board concluded that, even though it is correct that under 5 U.S.C. 2302(b)(9), the reprisal due to the filing of a grievance and the appeal to the Board is an action prohibited, that action is out of the

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[7] Martin claimed his performance rating was lowered as result of protected disclosures. He reported to his superiors allege violations to the agency own regulations and later followed with reports to OSC, an appeal to the MSPB, and a grievance. Also, previously he had prevailed in an appeal before the Board. The A.J. rejected the IRA appeal based on lack of jurisdiction because the disclosures were not made through such channels as would advance his whistleblowing claim.

Board jurisdiction under and IRA appeal; Martin, at 578. However, since the appellant had originally reported to superiors violations of the agency regulations by other employees, the Board had jurisdiction:

> *"... When an employee makes a number of related disclosures based upon the same operative facts, some of which are argued to come under 5 U.S.C. § 2302 (b)(8) and others under section 2302 (b)(9), those that come under section 2302(b)(8) provide a basis of Board IRA jurisdiction to review allegations of reprisal for whistleblowing."*; Martin, at 578.

Based on this standard, the I.D. was reversed. Because Carter, appears to rule that any element of the whistleblowing included in a grievance can't be use as a base for an IRA appeal, we suggested that Carter should be reversed in part (or clarified).

Before this Court, Náter posed that his issue is similar *to "Martin' issue"*, however, the Board conclusion did not follow Martin (ADD-4 and ADD-5). In Náter the Board concluded that his grievances revolved around differences of opinion as to the application of regulations to working papers, and hence, these were not protected disclosures. Náter reported to his closest superiors irregularities and violations to the agency professional auditing standards and agency regulations. See PFR-13, footnote 26. Those superiors were in charge to take measures to change the irregularities noted. Due to the lack of action by management, Náter moved to file grievance, EEO complaint, OSC report, and finally appealed to the Board. (See A-13 to -16, footnotes 26 to 33). In his appeal, Náter claimed the reprisal (lower ratings, non-selection for promotion, suspension for five days, etc.), was the result of his reports of the irregularities to management, because the filing of the EEO complaint, the OSC report, and the appeal per se. Then, the conditions in Náter were mostly the same than in Martin, but the Board did not apply the Martin standard.

Also, it is apparent that the subject matter under Náter grievances could have fallen within the Martin rule if the issue about the application of regulations to the working papers would have been considered an irregularity and not a mere difference of opinion among accounting professionals. Then, it is at this point that the new

and material evidence is important. One of the objectives of that new evidence was to support the allegation indicative that the disclosures corresponded to an irregular behavior with vices of illegalities. Further, it is clear, as it was explained in the PFR to the Board, that this new evidence was created and obtained after November 14, 1996 (i.e., after the close of the hearing record). (ADD-456).

As to the "Contributing Factor", in 99-3083, the Court concluded that Náter failed to show that the supervisor had any desire to retaliate against him. **adx H** at 6, 3rd ¶. However, it should be considered that the new evidence provided information supporting the allegation that the assistant to the supervisor had the animus and ill intention to retaliate because Náter disclosures (emphasis on A-462, item #6, A-45). This fact is in conflict with the Board's finding that there was no evidence sustaining animosity against Náter by Ríos. (**adx A**). The importance of the new evidence relates to Ríos memo disclosing his true feelings and continuous requests for supervisory actions against Náter. But, this information was notified to Náter during November 1997 as part of the process for remove him from the Federal Government; therefore, it was new and material evidence to be reviewed.

Therefore, the new evidence should support the existence of the required elements under the whistleblowing defense, the information was not available to Náter before the close of the record, and it was timely presented to the Board as part of the PFR. Then, very respectfully, Náter prays for reconsideration of the Court opinion and that the Board decisions be revoked and the case remanded for proper adjudication of the issues raised.

i) Conclusion.

In substance, this is one case of "mix" allegations of discrimination and reprisal as a result of whistleblowing. Petitioner exhausted all available administrative remedies, and finally filed for judicial review. Unfortunately, during the administrative appeal, the agency-respondent, nor the Board complied with the requirements notifying petitioner that his case was being dismissed for lack of jurisdiction; see 5 C.F.R. 1614.302(b). With this error, plaintiff was not put on proper notice of his next available procedural opportunities, thus, this was the root of the following defective process. Because the errors were not caused by the petitioner, the

courts below should allow petitioner to exercise the options provided per 5 C.F.R. 1614.302 (b).
Therefore, the writ of certiorari should be granted and the decision of the Federal Circuit Court be revoked with instruction to remand the case to the Board with instructions in accordance to this opinion.

Respectfully submitted,

Rafael Náter, pro-se petitioner. Date: Oct/23/2020

No. _____

In The

Supreme Court of the United States

Rafael Náter,

Petitioner

v.

Richard Riley, Secretary of the Department of Education,

Respondent

PROOF OF SERVICE

I, Rafael Náter, pro-se petitioner, declare that on this date, October 3, 2000, as required by Supreme Court Rule 29, I have served the enclosed PETITION FOR WRIT OF CERTIORARI on each party to the above proceeding or their legal representative, as applicable, by depositing an envelope containing three copies of the above stated document in the United States mail (U.S. Postal Service) properly addressed and with first-class postage prepaid.

This document was served this date on: The Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Ave., N.W., Washington, D.C. 20530-0001.

Also, I have notified the legal representative in the lower courts. (See page (ii) at n. 1 of the Petition).

I declare under the penalties of perjury that the foregoing is true and correct to the best of my knowledge and believe.

Date: October 03, 2000

Rafael Náter
Pro-se Petitioner

i) Appendix:

I. Judgements, Orders, Opinions, Administrative Decisions and Orders involved or closely related.

	Date	Opinion/Order	Docket No.
	-By the Merit System Protection Board:		
A.	18/Dec/1997	Initial Decision	NY-1221-96-0334-W-1.
B.	12/May/1998	Order: No Stay	NY-1221-98-0272-S-1.
C.	03/Nov/1998	Order: PFR-Denied	NY-1221-96-0334-W-1.
D.	23/Nov/1998	Order: No Hearing	NY-1221-98-0401-W-1.
E.	31/Dec/1998	Initial Decision	NY-1221-98-0401-W-1.
F.	02/Mar/1999	Initial Decision	NY-1221-98-0272-W-1.
G.	18/Mar/1999	Initial Decision	NY-0752-98-0297-I-1.
	-By the United States Court Of Appeals - Federal Circuit:		
H.	09/May/1999	Judg'nt/Opinion	99-3083, -3143, -3213.
I.	06/Jul/2000	Rehearing Denied	99-3083, -3143, -3213.
	-By the United States District Court - Dist. Of Puerto Rico:		
J.	14/Sep/2000	Judg'nt/Opinion	99-1366 (JP).

II. Other Relevant Material.

K. Selected section of "Opposition to Defendant's Motion For Dismissal And for Summary Judgement"; docket #63, case 99-1366 (JP) - D.C.P.R.

L. Petition For Review [to MSPB] docket: NY-1221-96-0334-W-1

M. "Petitioner's Statement Concerning Discrimination" - Filed with the Federal Circuit under case 99-3083.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
NEW YORK FIELD OFFICE

RAFAEL NATER (pro-se) Appellant	) DOCKET NUMBER
	) NY-1221-96-0334-W-1
v.	)
RICHARD RILEY, SECRETARY OF U.S. DEPARTMENT OF EDUCATION, Agency	) DATE: December 18, 1997

Anibal Escanellas Rivera, Esquire, San Juan, Puerto Rico, for the appellant.
Tracy Sasser, Esquire, Washington, D.C., for the agency.

BEFORE

William J. Lee
Administrative Judge

INITIAL DECISION

INTRODUCTION

On April 20, 1996, the appellant filed an Individual Right of Action (IRA) appeal with the Merit Systems Protection Board (Board) after the Office of Special Counsel (OSC) had closed its inquiry into his allegation that he was a victim of reprisal for whistleblowing activities. A jurisdictional hearing was held on November 14, 1996. For the reasons set forth below, the appellant's request for corrective action is DENIED.

ANALYSIS AND FINDINGS

Background

The appellant a GS-12 Auditor, first sought corrective action from OSC based on allegations that his performance evaluation was lowered in retaliation fc)r his whistleblowing. In addition, the appellant alleged that he was not selected for a position because of reprisal for whistleblowing. See Initial Appeal File (IAF), Tab 6, Subtabs 3-2, 3-3. OSC terminated its inquiry into the appellant's allegations on February 21, 1996. *See id.* The appellant then filed this timely IRA appeal.

In his IRA appeal,[1] the appellant's claimed that he was issued a fully successful performance evaluation during 1994, in lieu of a superior rating, and not selected for a position in 1995 due to whistleblowing, i.e. (1) a 1990 disclosure of an alleged misuse of a Diners Club card and (2) statements about the alleged official practices contained in a grievance filed in 1994 prior to the evaluation. *See* IAF, Tab 6, Subtabs 3-1, 3-.2 and 3-3.

General legal standards

It should be noted that in an IRA appeal, the Board's Jurisdiction is limited to adjudicating the whistleblower allegations, not the underlying personnel action or any other issues raised. *See Lewis v. Department of the Army*, 63 M.S.P.R. 119, 125-26 (1994), *aff'd*, 48 F.3d 1238 (Fed. Cir.), *cert. denied*, 116 S.Ct. 110 (1995) (citing *Marren v. Department of Justice*, 51 M.S.P.R. 632, 639 (1991), *aff'd*, 980 F.2d 745 (Fed. Cir. 1992) (Table). The appellant has the burden of proving jurisdiction by the Board before the merits of the whistleblower retaliation claim can be addressed. *See* 5 C.F.R. § 1201.56(a)(2)(i) (1997). To establish the Board's jurisdiction over an IRA

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[1] The appellant alleges, *inter alia*, in his moving papers that he was "looking for r a review of the case I presented as of October 14, 1994 to the Department of Education, EEO Division, where I claimed discrimination." *See* IAF, Tab 1. The courts have held that the filing of EEO complaints does not constitute whistleblowing activity protected under 5 U.S.C. § 2302(b)(8). *See Spruill v. Merit Systems Protection Board*, 978 F.2d 679, 691-2 (Fed. Cir. 1992).

appeal, the appellant must show by a preponderance of the evidence that:[2] 1) He engaged in whistleblower activity by making a disclosure protected under 5 U.S.C. § 2302(b)(8), i.e., he disclosed information that he reasonably believed evidenced a violation of law, rule, or regulation, gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health and safety; (2) the agency took or failed to take, or threatened to take or failed to take a personnel action as defined in 5 U.S.C. § 2302(a); and (3) he raised the whistleblower issue before the OSC, and proceedings before OSC have been exhausted. *See White v. Department of the Air Force*, 63 M.S.P.R. 90, 94 (1994); *Geyer v. Department of Justice*, 63 M.S.P.R.. 13, 16-17 (1994), *review dismissed*, 99 F.3d 1159 (Fed. Cir. 1996).

Personnel action and exhaustion of OSC proceedings.

An employee or former employee may seek corrective action from the Board regarding any "personnel action" which is proposed or taken against him as a result of whistleblowing, as described in 5 U.S.C. §2302(b)(8). Both a performance appraisal rating, and non-selection for a position is a "personnel action" under 5 U.S.C. § 2302(a)(2)(A)(iii). See *Eidman v. Merit Systems Protection Board*, 976 F.2d 1400, 1407 (Fed. Cir. 1992). Further, there is no dispute that he raised the issue of his performance appraisal and non-selection before OSC, and proceedings before OSC were exhausted. *See* IAF, Tab 6, Subtabs 3-2 and 3-3. Accordingly, I find that the appellant has met two of the requirements for the Board's jurisdiction over an IRA appeal.

The appellant's disclosure

In the present case, the appellant's allegation of whistleblowing was in his verbal disclosure to Thomas Whiting, his second-level supervisor, about the misuse of a credit card by his immediate supervisor, Profirio Rios, a violation of agency regulations, and the filing of grievances from June 12 to July 11, 1994, concerning, violations of agency

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[2] Preponderance of the evidence is defined as that degree of relevant evidence which a reasonable person considering the record as a whole would accept as sufficient to find that a contested fact is more likely to be true than untrue. *See* 5 C.F.R. § 1201.56(c)(2) (1997).

regulations. To show that his disclosure is protected by 5 U.S.C. § 2302(b)(8), the appellant must show that he disclosed information he reasonably believed evidenced a gross mismanagement or an abuse of authority or a violation of a law, rule, or regulation. *See Eidman*, 976 F.2d at 1407. The test to determine if a person has made a disclosure protected by 5 U.S.C. § 2302(b)(8) is whether a reasonable person in the appellant's position would believe that the matter reported constituted one of the situations specified at 5 U.S.C. § 2308(b)(8), violation by an agency of its regulations. *See Russell v. Department of Justice*, 68 M.S.P.R. 337, 342 (1995) (an appellant must set forth proof, either in the form of testimony or documentary evidence, or both, as well as establish that the matter reported was one that a reasonable person in his position would have believed violated 5 U.S.C. § 2302(b)(8)).

The test for whether the appellant had a reasonable belief that his disclosure evidenced a violation of agency regulation is an objective one. It does not required, proof of an actual regulatory violation, but only a showing that a "reasonable person in his position would believe" the disclosure evidenced a regulatory violation. *See Rusell, 68* M.S.P.R. at 342; *Garst v. Department of the Army*, 60 M.S.P.R. 514, 518 (1994). Based on the evidence of record, I find that the when the appellant informed Mr. Whiting about Mr. Rios misuse of government credit card, this was a disclosure within the meaning of 5 U.S.C. § 2302 (b)(8).

I do not find, however, that the appellant's 1994 grievances of June 12, 1994 through July 11, 1994, are protected disclosures. The Board has held that any matter disclosed within such grievances are not protected whistleblowing activities. *See Carter v. Department of the Army*, 62 M.S.P.R. 393, 402 (1994); *Fisher v. Department of Defense*, 47 M.S.P.R. 585, 587-88 (1991). The exercise of a grievance right does not, however, in and of itself, disqualify an employee from pursuing corrective action under the WPA as well. When an employee makes a number of related disclosures based upon the same operative facts, some of which are argued to come under 5 U.S.C. 2302(b)(8), and others under Section 2302(b)(9), those that come under section 2302(b)(8) provide a basis of Board IRA jurisdiction to review allegations of reprisal for whistleblowing. *See Martin v. Department of the Air Force*, 73 M.S.P.R. 574, 578

(1997). The evidence of record indicated that the subject matter of these grievances revolved around a difference of opinion among accounting professionals as to application of regulations to working papers. The Board has held that disagreements over policies are not protected disclosures especially when, as is the case, the disagreements are unspecified as to allegation of regulatory or legal violations made during discussions within the organization. *See Heining v. General Services Administration*, 61 M.S.P.R. 539, 554, 55 (1994), *reaff'd* on reconsideration, 68 M.S.P.R. 513 (1995). Accordingly, inasmuch at the evidence does not indicate that the appellant's 1995 performance rating or non-selection was in reprisal for his having made allegations in his grievances concerning the agency's violation of its regulation, those facts do not serve as a basis for a section 2302(b)(8) disclosure.

However, in analyzing a whistleblower reprisal claim, an administrative, judge may assume that an appellant is a whistleblower and has established that a protected disclosure was made, and go on to consider whether the disclosure was a contributing factor in a covered personnel action. *See Mausser v. Department of the Army*, 63 M.S.P.R. 41, 44 (1994). Accordingly, in light of the Board's reasoning in *Mausser*, I will make this assumption and find that the appellant's grievances are protected disclosures. Therefore, I will consider whether the appellant has shown that his status as a whistleblower was a contributing factor in the cited personnel actions.

Contributing factor

The appellant must demonstrate by a preponderance of the evidence that his protected disclosures were a contributing factor to the agency's decision to lower his performance evaluation. *See White*, 63 M.S.P.R. at 94. The words "a contributing factor" mean "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *See* 5 C.F.R. § 1209.4(c)(1997). One of the many possible ways to show that whistleblowing was a contributing factor in a personnel action is to show that "the agency official taking the action had actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action. *See 5* U.S.C. § 1221(e)(1)(A), (B); *Scott v. Department of Justice*, 69 M.S.P.R.

211, 238 (1995). Thus, circumstantial evidence of knowledge of the protected disclosure and a reasonable relationship between the time of the protected disclosure and the time of the personnel action will establish, *prima facie,* that the disclosure was a contributing factor to the personnel action. *See Horton v. Department of the Navy,* 66 F.3d 279, 284 (1995), *cert. denied,* 116 S. Ct. 1271 (1996). To counter the appellant's *prima facie* evidence that the protected disclosure was a contributing factor in a personnel action, the agency may introduce any relevant and competent evidence, including the reasons it acted.

The appellant may establish constructive knowledge of a protected disclosure, for purposes of showing that whistleblowing was a contributing factor in a personnel action, by demonstrating that an individual with actual knowledge influenced the official taking the action or by demonstrating that a person with constructive knowledge influenced the official taking the action, and the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing, factor in the personnel action. *Powers v. Department of the Navy,* 69 M.S.P.R. 150, 156 (1995). As with any other piece of circumstantial evidence, this is simply one more factor for the trier of fact to consider. *See id.* Such other factors may include the strength or weakness of the agency's reasons for taking the action, whether the whistleblowing was personally directed at the proposing or deciding officials, and whether these individuals had a desire or motive to retaliate against the appellant. *See Caddell v. Department of Justice,* 66 M.S.P.R. 347, 351 (1995), *aff'd,* 96 F.3d 1367 (Fed. Cir. 1996). Any weight given to a whistleblowing disclosure, either alone or in combination with other factors, can satisfy the contributing factor standard. *See Mausser,* 63 M.S.P.R. at 44.

1990 Disclosure

The appellant testified that his supervisor, Mr. Rios, did not adversely affect his 1990-1993 performance appraisal ratings, all of which were "superior" with outstanding elements. The appellant testified that he believed that these ratings came from three or four senior supervisors with some input from Mr. Rios. The appellant testified that Mr. Rios directly affected his 1994 performance appraisal rating in retaliation for his disclosure about Mr. Rios' misuse of a government credit card. The appellant testified

that he informed Mr. Whiting verbally, on an unspecified date, about Mr. Rios' misuse. *See* Hearing Tape 1, Sides 1, 2.

As Mr. Rios was not called by either side, no evidence was adduced that Mr. Rios had any knowledge of the protected disclosure made to Mr. Whiting in 1990 of at any time subsequent. In passing, I note that the only evidence of Mr. Rios' opinion of appellant are the highly laudatory comments of April 19, 1994 in appellant's mid-year appraisal. *See* IAF, Tab 6, Subtab 2-2. Moreover, the agency offered credible evidence that the appellant's lower rating was due to his performance. Mr. Eugene Tournour, the appellant's third-level super-visor and the author of his performance appraisal ratings, testified without contradiction that Mr. Rios had no input into the final result whatsoever. Mr. Whiting testimony echoed Mr. Toumour's.

It is possible, however, that even if the appellant's supervisor did not have actual knowledge of the disclosure, to find that imputed knowledge impermissibly influenced his decision. *Cf. Marchese v. Department of the Navy,* 65 M.S.P.R. 104, 108-09 (1994) (an appellant may establish constructive knowledge by demonstrating that an individual with actual knowledge of the disclosure influenced the official taking a retaliatory action). The appellant did not offer any evidence as to how his supervisor would have been aware that he made a protected disclosure to Mr. Whiting in 1990.

In light of these admissions, and in view of the remoteness in time, almost 4 years had elapsed between the protected disclosure and the performance appraisal rating, I find the 1990 disclosure was not a contributing factor to the appellant's 1994 performance appraisal rating. *See Powers v. Department of the Navy,* 69 M.S.P.R. 150, 155 *(1995); Rychen v. Department of the Army*, 51 M.S.P.R. 179, 183 (1991).

<u>The 1994 Disclosure</u>.

The appellant testified that he also believed that his performance appraisal was lowered as a result of his June 1994 grievance memorandum. See Hearing Tape, No. 1, Sides 1 and 2. The appellant's testimony indicated that the subject matter of his grievances revolved around a difference of opinion among accounting professionals as to application of regulations to working papers. The appellant's prolix testimony referred to a clash with his immediate supervisor, Mr. Rios, concerning "accounting

principles," alleged violation of unspecified "rules and regulation," and other irregularities and general disagreement with procedures. The appellant also indicated that most of the content of his testimony was not before the OSC. *See* Hearing tape 1, Side 2.

The appellant's second- and third-level supervisors, Mr. Whiting and Mr. Tournour, provided unrebutted testimony that the appellant had never informed them of any wrongdoing or violations of regulatory or statutory laws, although both were aware of appellant's grievances. Mr. Whiting testified that the appellant had complaint to him about procedural accounting rules since he arrived in Puerto Rico in 1989. Mr. Whiting described the appellant's attitude toward his immediate supervisor, Mr. Rios, and the rules of accounting as: "Rafael's way or no way." As noted above, both Mr. Whiting and Mr. Toumour testified that Mr. Rios had little or no input into the appellant's performance appraisals and that the appellant's present performance warranted the performance appraisal he received.

In his grievances, the appellant failed to specify any specific statute, rule or regulation violated by his immediate supervisor. *See* IAF, Tab 6, Subtabs 3-1, , 3-2, and 3-3. There is no evidence that either the appellant's second- or third- level supervisor or Mr. Rios had a desire or opportunity to retaliate against the appellant because of his protected disclosure. Accordingly, I find the appellant's claim to be without merit.

Appellant's allegation of non-selection

As to appellant's non-selection, no evidence was adduced at the hearing by either side. Accordingly, I find that the appellant abandoned this issue at the hearing. Assuming, that the appellant did not abandon this issue by the failure to offer any evidence at the hearing, there is no evidence of record establishing that his protected disclosures were a contributing factor in the agency's decision not to select him for the position of Auditor, GS-13.

DECISION

The appeal is request for corrective action is DENIED.

FOR THE BOARD:
(signed by:)

William J. Lee
Administrative Judge

NOTICE TO PARTIES CONCERNING SETTLEMENT

The date that this initial decision becomes final, which is set forth below, is the last day that the administrative judge may vacate the initial decision in order to accept a settlement agreement into the record. See 5 C.F.R. § 1201.112(a)(5).

NOTICE TO APPELLANT

This initial decision will become final on January 22, 1998, unless a petition, for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is the last day on which you can file a petition for review with the Board. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition, with supporting evidence and argument, must be filed with:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, NW., Room 806
Washington, DC 20419

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be postmarked or hand-delivered no later than the date this initial decision becomes final. If you fail to provide a statement with your petition that you have either mailed or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, D.C. 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 30 calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with Board's regulations.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
NEW YORK FIELD OFFICE

RAFAEL NATER (pro-se) Appellant	) DOCKET NUMBER
	) NY-1221-98-0272-S-1
v.	)
RICHARD RILEY, SECRETARY OF U.S. DEPARTMENT OF EDUCATION, Agency	) DATE: May 12, 1998

Rafael Nater, Guaynabo, Puerto Rico, pro se.
No designated representative for the agency.

BEFORE

Joseph A. Hallock
Administrative Judge

ORDER DENYING STAY REQUEST

INTRODUCTION

On March 30, 1998, the Board received the appellant's timely request for a stay of the agency's action removing him from the position of Auditor, GS-12, effective February 26, 1998.[1] For the reasons set forth below, the request is DENIED.

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[1] The request was mistakenly sent to the **Office** of the Clerk on March 31, 1998. It was received back in this office on May 5, 1998.

ANALYSIS AND FINDINGS

Background

A stay of a personnel action may be sought under 5 U.S.C. § 1221(c) by an employee who reasonably believes that the action was taken in reprisal for whistle blowing activities. *See* 5 U.S.C. § 2302(b)(8); 5 C.F.R. § 1209.1; *Williams v. Department of Defense,* 46 M.S.P.R. 549, 551 (1991). Under the Board's regulations, a stay request must contain, inter alia, evidence and/or argument showing that the action complained of was based on whistle blowing and that there is a substantial likelihood that the appellant will prevail on the merits of the underlying appeal. *See* 5 C.F.R. § 1209.9(a)(6)(ii) and (iii).

The appellant his not shown he is entitled to a stay.-

In order to show that he engaged in whistle blowing, the appellant must show, that he made a disclosure protected by 5 U.S.C. § 2302(b)(8), i.e., he disclosed information he reasonably believed evidenced a violation of law, rule, or regulation, gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health or safety. In order to prevail on the merits of his appeal, the appellant must demonstrate by preponderant evidence that a disclosure described under 5 U.S.C. § 2302(b)(8) was a contributing factor in the action complained of. *See McDaid v. Department of Housing and Urban Development,* 46 M. M.S.P.R. 416, 420 (1990).

Here, the stay request is imbedded in a 51-page narrative of events submitted by the appellant. In an introductory overview, the appellant alleges that "[d]uring March 1990 to June 1994, [he] made a series of disclosures about behavior and professional (audit) irregular practices at the Office of Inspector General ..." Under "Details" it states that the appellant "raised issues as to tardiness, abusive use of breaks and lunch time ..., abusive use of the official telephone line for personal purposes ..., uses of material and office equipment for other than official government purposes." Further, that the appellant became aware of using "the Government credit card for personal use and use of the government ID for non government purposes."

I find the latter disclosures, if reasonably believed, would constitute whistle blowing. The appellant, however, has not provided enough specific information

concerning his disclosures to support a finding the matter s he reported were such that a reasonable person in his position would believe they constituted whistle blowing. As to the former disclosures in the overview concerning "irregular practices," I find that these involve a difference of opinion between the appellant and others over the application of accounting standards and do not constitute whistle blowing. Furthermore, even assuming the appellant engaged in whistle blowing, he must demonstrate by a preponderance of the evidence that his protected disclosures were a contributing factor in the agency's decision to remove him. One of the ways an appellant can meet this burden is by evidence that the official taking the personnel action at issue knew of the disclosures, and the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosures were a contributing factor in the personnel action. *See Horton v. Department of the Navy,* 66 F.3d 279, 283-84 (Fed. Cir. 1995), *cert. denied,* 116 S.Ct. 1271 (1996). Here, the appellant cites disclosures made from 1990 to 1994, long before the agency proposed his removal in November 1997. Thus, I find it unlikely the appellant could satisfy the contributing factor standard under the knowledge/timing test. And I do not find that there is other evidence, such as that pertaining to the strength and weaknesses for taking the personnel action, whether the appellant's whistle blowing was personally directed, at the proposing or deciding officials, and whether these officials had a desire or motive to retaliate against the appellant which supports a conclusion that whistle blowing, was a contributing factor in the agency's action. Accordingly, I do not find the appellant has demonstrated a substantial likelihood he will prevail on the merits of his appeal.

Accordingly, I find that the appellant has not shown that he engaged in whistle blowing and that there is a substantial likelihood that he will prevail on the merits of the appeal. Under the circumstances, I find it unnecessary to decide whether a stay would result in extreme hardship to the agency. *See* 5 C.F.R. § 1209.10.

DECISION

The request for stay is denied.

FOR THE BOARD (signed by:) Joseph A. Hallock
Administrative Judge

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

RAFAEL NATER (pro-se) Appellant	) DOCKET NUMBER) NY-1221-96-0334-W-1
v.	)
RICHARD RILEY, SECRETARY OF U.S. DEPARTMENT OF EDUCATION, Agency	) DATE: NOV 3 1998)

Rafael Nater, Guaynabo, Puerto Rico, pro se.
Anthonier L. White, Esquire, Washington, D.C., for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

ORDER

After full consideration, we DENY the appellant's petition for review of the initial decision issued on December 18, 1997, because it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115. After the close of the record on petition for review, *see* 5 C.F.R. § 1201.114(i), the appellant submitted a reply to the agency's response to his petition for review; the Board has not considered this reply because the appellant has not shown good cause for his delayed filing. *See id.* This is the Board's final order in this appeal. The initial decision in this appeal is now final. 5 C.F.R. § 1201.113(b).

NOTICE TO THE APPELLANT REGARDING
FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703)(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

(signed by:) Robert E. Taylor
Clerk of the Board

Washington, D.C.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
NEW YORK FIELD OFFICE

RAFAEL NATER (pro-se) Appellant	) DOCKET NUMBER
	) NY-1221-98-0401-W-1
v.	)
RICHARD RILEY, SECRETARY OF U.S. DEPARTMENT OF EDUCATION, Agency	) DATE: November 23, 1998

ORDER

After careful consideration of the record on the issue of jurisdiction, I have determined that the Board lacks jurisdiction over this appeal. Because the appellant did not plead facts which, if true, would establish jurisdiction, his request for a hearing is DENIED. *See Manning v. Merit Systems Protection Board,* 742 F.2d 1424, 1427-28 (Fed. Cir. 1994). Because of my determination concerning jurisdiction, I find it unnecessary to rule on any pending motions. An initial decision containing my findings of fact and conclusions of law will be forthcoming. All further proceedings in this appeal are STAYED pending the issuance of my initial decision.

FOR THE BOARD:

(signed by:) Joseph A. Hallock
Administrative Judge

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
NEW YORK FIELD OFFICE

RAFAEL NATER (pro-se) Appellant	) DOCKET NUMBER
	) NY-1221-98-0401-W-1
v.	)
RICHARD RILEY, SECRETARY OF U.S. DEPARTMENT OF EDUCATION, Agency	) DATE: December 31, 1998

Rafael Nater, Guaynabo, Puerto Rico, pro se.
Tracy Sasser, Esquire, Washington, D.C., for the agency.

BEFORE

Joseph A. Hallock
Administrative Judge

INITIAL DECISION

INTRODUCTION

The appellant filed a timely individual right of action (IRA) appeal alleging that his performance evaluation for the year which ended, April 30, 1997, was based on whistleblowing activities. See Appeal File (AF) Tab 1. For the reasons set forth below the appeal is DISMISSED for lack of jurisdiction. Because the appellant did not plead facts which, if true, would establish jurisdiction, the hearing he requested was not held. *See Manning v. Merit Systems Protection Board,* 742 F.2d 1424, 1427-28 (Fed. Cir. 1984).

JURISDICTION

The Board's jurisdiction is not plenary, but is limited to those areas specifically granted by some law, rule or regulation.. *See Antolin v. Department of Justice,* 825 F.2d 1395, 1396 (Fed. Cir. 1989), *cert. denied,* 498 U.S. 868 (1990). The appellant has the burden of proof by a preponderance of the evidence[1] on the issue of jurisdiction. See *5* C.F.R. § 1201.56(a)(2).

To establish the Board's jurisdiction over an IRA appeal, an appellant must show, by a preponderance of the evidence, that: (1) He engaged in whistleblower activity by making a disclosure protected by 5 U.S.C. § 2302(b)(8), *i.e.*, he disclosed information he reasonably believed evidenced a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, abuse of authority, or a substantial and specific danger to public health or safety; (2) the agency took or failed to take, or threatened to take or fail to take, a "personnel action" as defined in 5 U.S.C. § 2302(a)(2) after the July 9, 1989, effective date of the Whistleblower Protection Act (WPA); and (3) he raised the whistleblower issue before the Office of Special Counsel and proceedings before the OSC have been exhausted. *See Geyer v. Department of Justice,* 63 M.S.P.R. 13, 16-17 (1994).

I issued an Order to Show Cause which informed the appellant of the requirements which had to met in order for the Board to have jurisdictions over his appeal. *See* AF, Tab 3. The Order to Show Cause informed the appellant that his appeal would be dismissed unless he alleged facts which, if proven, would establish that the Board had jurisdiction over his appeal. *Id.* The Order to Show Cause required the appellant to file a copy of all 'correspondence which he sent to the OSC and all correspondence he received from the OSC concerning the appealed action. Included with the appellant's response to the Order to Show Cause is the complaint which he filed with the OSC. *See* Tab 4, Report of Prohibited activity. In the complaint, the appellant alleged that the motives for the

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[1] Preponderant evidence is that degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely true than not. *See* 5 C.F.R. § 1201.56(c)(2).

agency's action were grievances and an EEO complaint which he filed and his refusal to desist from grievances and appeals he filed against the agency. *Id.* at 1-2. The appellant also alleged that because he "noticed' many conditions which lead [him] to perceive probable wrong doing[,]" he started asking for written orders and directives. The appellant also stated he was sending to the OSC a copy of the "answers" he provided in response to the 1997 evaluation. *Id.* at 4. This is an apparent reference to a formal grievance which the appellant filed relative to the 1997 evaluation which is in the record. *See* AF, Tab 1.

To the extent the appellant alleged before the OSC that his 1997 evaluation was in reprisal for grievances and an EEO complaint which he filed, this can not serve as a basis for the Board to exercise jurisdiction over his IRA appeal. The essential difference between the protections of 5 U.S.C. §§ 2308(b)(8) and 2308(b)(9) is the difference between "reprisal based on disclosure of information and reprisal based upon exercising a right to complain." *Serrao v. Merit Systems Protection Board,* 95 F.3d 1569, 1575 (Fed. Cir. 1996) (quoting *Spruill v. Merit Systems Protection Board,* 978 F.2d 679, 690 (Fed. Cir. 1992)). Disclosures made only in grievances and EEO complaints are not protected under the WPA. *See Serrao,* 95 F.3d at 1574-75; *Thomas v. Department of the Treasury,* 77 M.S.P.R. 224, 230 (1998); *Martin v. Department of the Air Force,* 73 M.S.P.R. 574, 578-79 (1997). Alleged protected disclosures not raised before the OSC are not within the Board's jurisdiction. *See Brewer v. Department of the Interior,* 76 M.S.P.R. 363, 367 (1997).

Beyond the appellant's claims to the OSC that his 1997 evaluation was in reprisal for grievances and an EEO complaint which he filed, I find nothing in the balance of his complaint to the OSC which shows he made disclosures which evidenced a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse o authority, or a substantial and specific danger to public health or safety. The alleged protected disclosures contained in the complaint do not disclose "the type of fraud, waste, or abuse that the WPA was intended to reach." *Ellison v. Merit Systems Protection Board,* 7 F.3d 1031, 1035 (Fed. Cir. 1993). I find the alleged "disclosures" represent no more than professional disagreement, which do not rise to the level of

whistleblowing disclosures. *See Carolyn v. Department of the Interior*, 63 M.S.P.R. 684, 691-92, *review dismissed*, 43 F.3d 1485 (Fed. Cir. 1994) (Table), *overruled in part on other grounds, Thomas*, 77 M.S.P.R. 224, 236 n. 9 (1998).

Accordingly, the Board lacks jurisdiction over this appeal.

DECISION

The appeal is DISMISSED.

FOR THE BOARD (signed by:) Joseph A. Hallock
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on February 4, 1999, unless a petition, for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if this initial decision is received by you more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition, with supporting evidence and argument, must be filed with:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, NW., Room 806
Washington, DC 20419

If you file a petition for review, the Board will obtain the record in

your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be postmarked, faxed or hand-delivered no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. If you fail to provide a statement with your petition that you have either mailed, faxed, or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, D.C. 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 60 calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with Board's regulations.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
NEW YORK FIELD OFFICE

RAFAEL NATER (pro-se) Appellant	) DOCKET NUMBER) NY-1221-98-0272-W-1
v.	)
RICHARD RILEY, SECRETARY OF U.S. DEPARTMENT OF EDUCATION, Agency	) DATE: March 2, 1999)

Rafael Nater, Guaynabo, Puerto Rico, pro se.
Anthonier White, Esquire, Washington, D.C., for the agency.

BEFORE
Joseph A. Hallock
Administrative Judge

INITIAL DECISION

INTRODUCTION

The appellant was employed as an Auditor, GS-12, with the agency's Office of Inspector General, Northeast Area Puerto Rico Office, in San Juan, Puerto Rico. He filed a timely individual right of action (IRA) appeal alleging that his performance appraisals for the years which ended April 30, 1996, (1996 appraisal) and April 30, 1997 (1997 appraisal), and a 5-day suspension effective October 28, 1996, were base on whistleblowing activities.[1] He also alleged that he was discriminated against by the

[1] The appellant also appealed his removal effective February 26, 1998. Because the removal was an otherwise appealable action, and the appellant had not sought corrective action from the Special Counsel for his removal before appealing to the Board, it was docketed separately. *See Nater v. Department of Education*, MSPB Docket No. NY-0752-98-0297-I-1.

agency because of his race, national origin, and Political affiliation. *See* Appeal File (A-F), Tabs I and 9. For the reasons set forth below, the appeal is DISMISSED for lack of jurisdiction. Because the appellant did not plead facts which, if true, would establish jurisdiction, the hearing he requested was not held. *See Manning v. Merit Systems Protection Board,* 742 F.2d 1424, 1427-28 (Fed. Cir. 1984).

JURISDICTION

The Board's jurisdiction is not plenary, but is limited to those areas specifically granted by some law, rule or regulation.. *See Antolin v. Department of Justice,* 825 F.2d 1395, 1396 (Fed. Cir. 1989), *cert. denied,* 498 U.S. 868 (1990). The appellant has the burden of proof by a preponderance of the evidence[2] on the issue of jurisdiction. See 5 C.F.R. § 1201.56(a)(2).

To establish the Board's jurisdiction over an IRA appeal, an appellant must show, by a preponderance of the evidence, that: (1) He engaged in whistleblower activity by making a disclosure protected by 5 U.S.C. § 2302(b)(8), *i.e.*, he disclosed information he reasonably believed evidenced a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, abuse of authority, or a substantial and specific danger to public health or safety; (2) the agency took or failed to take, or threatened to take or fail to take, a "personnel action" as defined in 5 U.S.C. § 2302(a)(2) after the July 9, 1989, effective date of the Whistleblower Protection Act (WPA); and (3) he raised the whistleblower issue before the Office of Special Counsel and proceedings before the OSC have been exhausted. *See Geyer v. Department of Justice,* 63 M.S.P.R. 13, 16-17 (1994).

I issued an Order to Show Cause which informed the appellant of the requirements which had to met in order for the Board to have jurisdictions over his appeal. *See* AF, Tab 4. The Order to Show Cause informed the appellant that his appeal

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[2] Preponderant evidence is that degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely true than not. *See* 5 C.F.R. § 1201.56(c)(2).

would be dismissed unless he alleged facts which, if proven, would establish that the Board had jurisdiction over his appeal. *Id.* The Order to Show Cause required the appellant to file copy of all correspondence that he sent to OSC concerning the appealed actions. Included with the appellant's response to the order to show cause are two complaints which he filed with the OSC. *See* AF, Tab 17, attachment A and B. One complaint is dated January 20, 1997, and concerned the 1996 appraisal and the suspension. *Id.*, attachment A. The other is dated May 20, 1998, and concerned the 1997 appraisal. *Id.*, attachment B.

The 1996 appraisal and the suspension

In his complaint to the OSC, the appellant alleged that the motives for the agency's actions were grievances and an EEO complaint which he filed and his refusal to desist from grievances and appeals he filed against the agency. *See* A-F, Tab 17, attachment A. The appellant alleged that because he "noticed many conditions which lead [him] to perceive probable wrong doing[,]" he started asking for written orders and directives. The appellant attached to the complaint his responses to the findings contained in a Quality Assurance review of audits in which he participated. *Id.*

To the extent the appellant alleged before the OSC that his 1997 evaluation was in reprisal for grievances and an EEO complaint which he filed, this can not serve as a basis for the Board to exercise jurisdiction over his IRA appeal. The essential difference between the protections of 5 U.S.C. §§ 2308(b)(8) and 2308(b)(9) is the difference between "reprisal based on disclosure of information and reprisal based upon exercising a right to complain." *Serrao v. Merit Systems Protection Board,* 95 F.3d 1569, 1575 (Fed. Cir. 1996) (quoting *Spruill v. Merit Systems Protection Board,* 978 F.2d 679, 690 (Fed. Cir. 1992)). Disclosures made only in grievances and EEO complaints are not protected under the WPA. *See Serrao,* 95 F.3d at 1574-75; *Thomas v. Department of the Treasury,* 77 M.S.P.R. 224, 230 (1998); *Martin v. Department of the Air Force,* 73 M.S.P.R. 574, 578-79 (1997). Alleged protected disclosures not raised before the OSC are not within the Board's jurisdiction. *See Brewer v. Department of the Interior,* 76 M.S.P.R. 363, 367 (1997).

Beyond the appellant's claims to the OSC that his 1996 evaluation and the suspension were in reprisal for grievances and an EEO complaint which he filed, I find nothing in the balance of his complaint to the OSC which shows he made disclosures which evidenced a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse o authority, or a substantial and specific danger to public health or safety. The alleged protected disclosures contained in the complaint do not disclose "the type of fraud, waste, or abuse that the WPA was intended to reach." *Ellison v. Merit Systems Protection Board,* 7 F.3d 1031, 1035 (Fed. Cir. 1993). I find the alleged "disclosures", including the appellant's responses to the findings of the Quality Assurance review team, represent no more than professional disagreement, which do not rise to the level of whistleblowing disclosures. *See Carolyn v. Department of the Interior,* 63 M.S.P.R. 684, 691-92, *review dismissed,* 43 F.3d 1485 (Fed. Cir. 1994) (Table), *overruled in part on other grounds, Thomas,* 77 M.S.P.R. 224, 236 n. 9 (1998).

The 1997 appraisal

The instant appeal was filed on March 30, 1998. The appellant's complaint to the OSC concerning the 1997 appraisal is dated May 27, 1998. *See* A.F., Tab 17, attachment B. Thus, the record is clear that at the time the appeal was filed the appellant has not raised the whistleblower issue before the OSC and proceedings before the OSC could not have been exhausted. The Board, therefore, had no basis on which to exercise jurisdiction over the appeal concerning the 1997 appraisal at the time it was filed.[3]

Moreover, IRA appeals under the WPA are not subject to the provisions of 5 U.S.C. § 7701 or § 7702 thus, the Board lacks jurisdiction to adjudicate the merits of the personnel actions at issue in an IRA appeal and lacks the authority to decide, in conjunction with an IRA appeal, the merits of an appellant's allegations of prohibited discrimination. *Marren v. Department of Justice,* 51 M.S.P.R. 632, 638-39 (1991),

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[3] The appellant's claim that the 1997 appraisal was based on whistleblowing activities later became the subject of a separately filed appeal. I issued an initial derision which dismissed that appeal for lack of

aff'd, 980 F.2d 745 (Fed. Cir. 1992) (Table), *modified in part on other grounds, Robinson v. U.S. Postal Service*, 63 M.S.P.R. 307, 323 n. 13 (1994). Accordingly, the Board lacks jurisdiction over this appeal.[4]

DECISION

The appeal is DISMISSED.

FOR THE BOARD (signed by:) Joseph A. Hallock
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on April 6, 1999, unless a petition, for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if this initial decision is received by you more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

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1120 Vermont Avenue, NW., Room 806
Washington, DC 20419

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part

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[4] jurisdiction. *See Nater v. Department of Education*, MSPB Docket No-NY-1221-98-0401-W-1 (Initial Decision, December 30, 1998).

of the record. Your petition must be postmarked, faxed or hand-delivered no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. If you fail to provide a statement with your petition that you have either mailed, faxed, or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

JUDICIAL REVIEW

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The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, D.C. 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 60 calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with Board's regulations.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
NEW YORK FIELD OFFICE

RAFAEL NATER (pro-se) Appellant	) DOCKET NUMBER
	) NY-0752-98-0297-I-1
v.	)
RICHARD RILEY, SECRETARY OF U.S. DEPARTMENT OF EDUCATION,	) DATE: March 18, 1999
Agency	)

Rafael Nater, Guaynabo, Puerto Rico, pro se.
Anthonier White, Esquire, Washington, D.C., for the agency.

BEFORE

Joseph A. Hallock
Administrative Judge

INITIAL DECISION

INTRODUCTION

The appellant filed a timely appeal of the agency's decision to remove him from the position of Auditor, GS-12, effective February 27, 1998. The hearing he requested was held on July 9 and 10, 1998. The Board has jurisdiction over this appeal.. *See 5* U.S. C. §§ 751 1(a), 7512, and 7513. For the reasons set forth below, the agency's action is AFFIRMED.

ANALYSIS AND FINDINGS.

Background

The agency proposed the appellant's removal based on numerous charges of insubordination and unprofessional, disrespectful, and, inappropriate conduct,. the specifications of which were detailed in its November 17, 1997, proposal noticed. *See* Appeal File (A-F) Tab 6, Subtab 4e. On January 25, 1998, the agency's deciding, official issued a decision removing the appellant from his position based on three sustained charges of insubordination and one sustained charge of inappropriate and unprofessional behavior. *Id.* Subtab 4b. This appeal followed. In his appeal, the appellant asserted the affirmative defenses of whistleblower retaliation and national origin discrimination. *See* AF, Tabs 1, 4 and 10 (audio tape).

Burdens of proof

The agency bears the burden of proving each element of its charges by a preponderance of the evidence.[1] *Burroughs v. Department of the Army*, 918 F.2d 170, 172 (Fed. Cir. 1990). The agency must also prove: (1) The existence of a nexus between the sustained charges and the efficiency of the service, 5 U.S.C. § 7513(a); and (2) the reasonableness of its penalty. *See Douglas v. Veterans Administration,* 5 M.S.P.R. 280, 302 (1981). The appellant bears the burden of proving his affirmative defenses by a preponderance of the evidence. *See* 5 C.F.R. § 1201.56(a)(2)(iii).

Factual background

The appellant was employed as an Auditor with the agency's Office of Inspector General, Northeast Area, Puerto Rico Office, in: San Juan, Puerto Rico. During all relevant times, he was under the supervision of Guido G. Piacesi, Celia Ruiz or Maureen Duddy. Piacesi the proposing official, was the Regional Inspector General for Audit (RIGA) and Area Manager. Hugh M. Monaghan, the deciding official, was the Assistant Inspector General for Operations, Eastern Area, at the time he issued his decision to

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[1] Preponderant evidence is that degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely true than not. *See* 5 C.F.R. § 1201.56(c)(2).

remove the appellant. The appellant worked on audits of educational institutions which received funds from the agency for student loans and grants. The purpose of the audits was to insure that the funds were being used in accordance with law. *See* Hearing Transcript, Vol. I (HTI) at 112. An auditor, such as the appellant, would prepare working papers which formed the foundation for an audit's conclusions. The conclusions would be embodied in a final report signed by Piacesi. *Id.* at 113. It was customary for the working papers to be reviewed by a senior auditor, supervisory auditor, or auditor-in-charge, and for the auditor to respond to the review notes. *Id.* at 1 14-19.

The agency proved charge one - insubordination.

The agency charged the appellant with insubordination on December 10, 1996. The specifications of this charge were that the appellant refused to comply with Ruiz's directions to review his International Junior College (IJC) working papers as an assurance they met the Government Auditing Standards. Insubordination is define as a refusal to obey some order that a superior officer is entitled to give and have obeyed. *See Hamilton v. U.S. Postal Service,* 71 M.S.P.R. 547, 555 (1996); *Fleckenstein v. Department of the Army,* 63 M.S.P.R. 470, 473 (1994) (citing *Webster v. Department of the Army,* 911 F.2d 679, 684 (Fed. Cir. 1990), *cert. denied,* 502 U.S. 861 (1991). In order to prove insubordination, the agency must show that the appellant's refusal to obey a proper order was intentional and willful disobedience. *See Hamilton,* 71 M.S.P.R. at 555.

On July 12, 1996, Piacesi had sent the appellant a message which stated, "I want you to understand that without question, you should respond to Celia's request for information whether the response is direct work related or administrative in nature." See AF, Tab 6, Subtab 4e at 9. Ruiz testified that on December 10, 1996, she asked the appellant to review his IJC working papers to insure they were in compliance with a Quality Assurance Review checklist and Government Auditing Standards. She testified that the appellant refused to do what was asked. *See* HTI at 177-83. She testified that on December 13, 1996, she sent the appellant her instructions in an inter-office, memo. *See* HTI at 184; AF, Tab 6, Subtab 4h. She testified that the appellant never did what

was directed and she had to do the work. *See* HTI at 186. Piacesi testified he had to assign others to do the work. *Id.* at 42-43.

The appellant testified that on December 10, 1996, he told Ruiz that if she wanted him to do more work on IJC, he needed a certain amount of information in writing before he would do more work. *See* Hearing Transcript, Vol. II (HTII) at 317. He attached other conditions to complying with Ruiz's directions. *Id.* He responded to Ruiz's December 13, 1996, memo in a memorandum dated December 17, 1996. *See* AF, Tab 7, Subtab F. In his memorandum, the appellant stated it was not "appropriate" for him to comply with Ruiz's request because he had already responded to her review contents, his two prior performance evaluations were under review, he was the subject of a complaint by the auditee which might result in a "legal issue," and he was "retired" from that audit. The appellant closed the memorandum by setting forth conditions to be met by the agency before he would comply with Ruiz's instructions. He stated that compliance with his conditions had to be in writing and verbal instructions would not be "proper." The appellant contends that these circumstances show he did not willfully refuse to obey a proper order. I disagree.

The appellant sought to impose conditions which the agency had to meet before he would do what he was asked by Ruiz. An employee does not have the unfettered right to disregard an order merely because there is substantial reason to believe that the order is not proper; he must first comply with the order and then register his complaint or grievance, except in certain limited circumstances where obedience would place the employee in a clearly dangerous situation, or when complying with the order would cause him irreparable harm. *Cooke v. U.S. Postal Service,* 67 M.S.P.R. 401, 407-08 (1995), *aff'd*, 73 F.3d 380 (Fed. Cir. 1995) (Table). The record does not show that the appellant's compliance with Ruiz's order would have placed him in a clearly dangerous situation or caused him irreparable harm.

Piacesi testified that, after receiving the appellant's memorandum, he spoke with the appellant and reminded him that he had to comply with Ruiz's directions. HTI at 40. He explained to the appellant the need for the work he was being asked to perform. He testified that there was always a risk of litigation attendant upon an audit, but the, work

the appellant was directed to perform was in furtherance of putting the agency in a position to be able to defend against that risk. *Id.* at 81. Under the circumstances, I find that the appellant's conduct constituted intentional and willful disobedience. Accordingly, I find the agency met its burden of proof on this charge.

The agency proved charge two - insubordination.

The agency charged the appellant with insubordination on March 19, 1997. The specification of this charge was that the appellant refused to comply with Duddy's direction to respond to her review notes on his IJC working papers. Piacesi testified that he temporarily assigned Duddy to supervise the Puerto Rico office in February 1997. He testified that he informed the staff of the office, including the appellant, of this during a conference call before she reported to Puerto Rico. Duddy's permanent position was in Boston. *Id.* at 44-45. Duddy testified that on March 19, 1997, she gave the appellant her review notes of his working papers and asked him to respond. Later in the day, when it was apparent the appellant had not done anything to comply with her request, she took the notes back. She testified that, when she took the notes back, she specifically informed the appellant that she viewed his inaction as a refusal to do the work she asked him to perform. *Id.* at 224-30. Duddy's version of events was corroborated by Ruiz. *Id.* at 186-88.

The appellant testified that he told Duddy that her review notes were ill intentioned, not done for legitimate reasons, were just done to harass him, ant to serve as a pretext for his removal. See HTII at 322. He testified he told Duddy that before he complied with her request he wanted an opportunity to discuss the matter with higher level official. *Id.* at 401. The appellant denied he intentionally refused to respond to Duddy's review notes. I disagree. I find the appellant's response to Duddy's direction was to raise conditions precedent which the agency had to meet before he would comply with the direction he was given. I find he could not require that his conditions be met before he complied. I find that by imposing conditions precedent on his compliance, he effectively refused to comply with Duddy's direction. The record does not show that the appellant's compliance with Duddy's direction would have placed him in a clearly dangerous situation or caused him irreparable harm. *See Cooke,* 67 M.S.P.R. at 407-08.

I find the appellant's refusal to comply with Duddy's direction was not excusable and constituted intentional and willful disobedience. Accordingly, I find the agency met its burden of proving this charge.

The agency proved charge three - insubordination.

The agency charged the appellant with insubordination on July 31, 1997. The specification of this charge was that in a meeting with Piacesi on July 31, 1997, the appellant refused Piacesi's direction that he and Ruiz work together as an audit team. Piacesi testified that when he met with the appellant on July 31, 1997, Porfirio Rios Rojas (Rios), an employee in the Puerto Rico office who once supervised the appellant, had taken another job leaving only the appellant and Ruiz in the office. It, therefore, became important to Piacesi to have the appellant work under the direction of Ruiz as part of an audit team in order to accomplish the work of the office. Piacesi testified that one of his purposes in meeting with the appellant "was to talk to him about whatever it was that we could do to get him to cooperate with us and -- and work as a team member[,] I'd be willing to do." HTI at 50. He testified that the appellant refused to do this.

The appellant testified that Piacesi ordered him to work with Ruiz without asking questions, without requiring written instruction, and without documenting his disagreements with her. He testified he told Piacesi that in a team approach he and Ruiz should be reviewing each other's working papers instead of just Ruiz reviewing his working papers. He testified that Piacesi told him he would have to work under Ruiz's supervision and to do what she asked "without doing (sic) any questions." HT 1'.11 at 329. He testified that he would not work under such conditions because that would simply be allowing the office to "frame" him.

I find, considering the record as a whole, that what the appellant characterized as Piacesi telling him he would have to work under Ruiz's supervision without asking any questions, was actually Piacesi telling him he would have to accept direction from Ruiz without questioning her authority, insisting that her directions be in writing, or seeking to impose conditions precedent to complying with her directions as he had done in the

past. I find the appellant refused to do this. I find his refusal was willful and intentional. Accordingly, I the agency proved this charge.

The agency proved charge four - inappropriate and unprofessional behavior.

The agency charged the appellant with inappropriate and unprofessional behavior on October 21, 1997. The specification of this charge was that in a telephone conversation with Duddy on October 21, 1997, the appellant became irate, yelled at her, and claimed that her questioning of his work was all part of a conspiracy against him. Duddy testified that she called the appellant from Boston to discuss concerns she had about a confirmation letter sent by the appellant to students at Interamerican University. She testified that the appellant "started yelling and screaming at [her] that no one has questioned his work in the last seven years, and this is all part of the conspiracy against him." HT I at 233. She testified it was hard for her to get a word in edge-wise because the appellant was yelling so much. She testified that right after her call to the appellant, she received a call from Ruiz who had heard the appellant yelling and screaming and was concerned to know if Duddy was all right. *Id.* at 234-36. Duddy's version of events was corroborated by Ruiz. *Id.* at 188-92.

The appellant testified that Duddy was "not calm" and spoke to him in a "high tone," but she was "not exactly yelling[.]" He testified that Duddy got on his nerves and he told her she was colluding to get rid of him, harassing him, and provoking him. He testified that at a certain point he "got even more mad" at Duddy. *See* HTII at 336-38. An agency is entitled to expect its employees to conform to certain accepted standards of civil behavior and decorum. *See Redfearn v. Department of Labor,* 58 M.S.P.R. 307, 316 (1993). I find that the appellant yelled at Duddy to the extent that she had difficulty speaking with him. I further find that he yelled so loudly that Ruiz, who could hear him even behind her closed door, became so concerned that she called Duddy to ask if she was all right. I find the appellant thereby engaged in inappropriate and unprofessional behavior. Accordingly, I find the agency proved this charge.

The appellant's claim of whistleblower retaliation.

There are three steps in a complete analysis of an employee's whistleblower defense to an adverse personnel action. First, is the employee's disclosure a protected

whistleblowing" activity under 5 U.S.C. § 2302(b)(8)? Second, was the disclosure a contributing factor in the personnel action? *Id.* § 1221(e)(1). Third, can the agency prove by clear and convincing evidence that it would have taken the same personnel action in the absence of the disclosure? *Id.* § 1221(e)(2). No particular sequence of analysis is mandated. *See Clark v. Department of the Army,* 997 F.2d 1466, 1470 (Fed. Cir. 1993), *cert. denied,* 114 S.Ct. 920 (1994).

The appellant proved he engaged in whistleblowing.

The appellant testified that he engaged in protected whistleblowing as detailed in his appeal. *See* HTII at 353-36. In his appeal, the appellant alleged he raised issues of tardiness, abusive use of breaks and lunch time, abusive use of the official telephone for personal purposes, and use of material and office equipment for other than official government purposes. Also, he reported use of a Government credit card for personal use and use of a Government identification card for non-government purposes. Further, he reported lack of compliance with many professional audit requirements. Rios was the main subject of the appellant's alleged protected disclosures. See AF, Tab 19 at 10. He reported these matters first to Rios and then to the assistant supervisor in New York, Thomas Whiting. He reported these matters over a period of four years after his arrival in Puerto Rico in March 1990. *See* AF, Tab 1 at p. 11; HTII at 344. He testified that his protected disclosures were embodied in a written report he made in June 1994. *Id.* at 361. On cross-examination, he testified that the report made in June 1994 was actually a grievance which he filed. *Id.* at 401.

The appellant had to demonstrate by preponderant evidence that he disclosed information he reasonably believed evidenced a violation of law, rule, or regulation. The test for whether a putative whistleblower has a reasonable belief in the disclosure is an objective one. *See Haley v. Department of the Treasury,* 977 F.2d 553, 557 (Fed. Cir. 1992), *cert. denied,* 508 U.S. 950 (1993). The appellant need not prove an actual violation of law, rule, or regulation. Rather, he must show the matter reported was one that a reasonable person in his position would believe evidenced a violation of law, rule, or regulation. *See Carolyn v. Department of the Interior,* 63 M.S.P.R. 684, 690, *review*

dismissed, 43 F.3d 1485 (Fed. Cir. 1994) (Table), *overruled in part on other grounds, Thomas v. Department of the Treasury,* 77 M.S.P.R. 224, 236 n. 9 (1998).

I find the appellant did not set forth his allegations of lack of compliance with auditing standards with sufficient specificity. *See Padilla v. Department of the Air Force,* 55 M.S.P.R. 540, 543-44 (1992). To the extent the appellant relies on disclosures contained in grievances or EEO complaints which he filed, I find these are not protected under the Whistleblower Protection Act (WPA). Disclosures made only in grievances and EEO complaints are not protected under the WPA. *See Serrao v. Merit Systems Protection Board,* 95 F.3d 1569, 1574-75 (Fed. Cir. 1996); *Thomas,* 77 M.S.P.R. at 230; *Martin v. Department of the Air Force,* 73 M.S.P.R. 574, 578-79 (1997). I find that many of the appellant's alleged "disclosures" represent no more than professional disagreement, which do not rise to the level of whistleblowing disclosures. *See Carolyn,* 63 M.S.P.R. at 691-92. I find, nonetheless, that the appellant's disclosures concerning abuse of official time, misuse of government equipment, misuse of a credit card, and misuse of an identification card are protected disclosures. Accordingly, I find the appellant proved he engaged in whistleblowing.

The appellant did not prove his whistleblowing was a contributing factor in his removal.

The appellant has the burden of proving that his whistleblowing was a contributing factor in his removal. The appellant may meet this burden through circumstantial evidence, such as evidence that the official taking the personnel action knew of the disclosure, and the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action. *See Horton v. Department of the Navy,* 66 F.3d 279, 283-84 (Fed. Cir. 1995), *cert. denied,* 116 S.Ct. 1271 (1996). Thus, an appellant satisfy the contributing factor standard by satisfying this knowledge/timing test. *Id.* I find the record does not contain preponderant evidence to show that Piacesi and Monaghan knew of the appellant's disclosures. Furthermore, the disclosures were made from March 1990 to June 1994, many years before Piacesi proposed the appellant's removal. Thus, I find the appellant failed to prove his disclosures were a contributing factor in under the knowledge/timing test. The knowledge/timing test is not

the only way for an appellant to satisfy the contributing factor standard. It is but one of may ways. Other evidence, such as that pertaining to the strength or weakness of the agency's reasons for taking the personnel action, whether the whistleblowing was personally directed at the proposing or deciding officials, and whether these individuals had a desire or motive to retaliate against the appellant must be considered. *See Powers v. Department of the Navy,* 69 M.S.P.R. 150, 156 (1995).

Here, the evidence shows that the agency had a strong need to take its action, namely, the appellant's acts of serious misconduct. It also shows that the appellant's whistleblowing was not personally directed at either Piacesi or Monaghan, the proposing and deciding officials. Nor was there any evidence introduced to show that either individual had a desire or motive to retaliate against the appellant. On the contrary, I find it shows that Piacesi made a concerted effort to get the appellant to work in cooperative, constructive ways which would have contributed to a successful operation of the Puerto Rico office and the accomplishment of its mission, even offering to hire a consultant to help the appellant and Ruiz work as an audit team. *See* HTI at 50. Accordingly, I find the appellant failed to meet his burden of proving that his disclosures were a contributing factor in the agency's decision to remove him.

The agency proved by clear and convincing evidence that it would have removed the appellant absent his disclosures.

Even if an appellant shows that a protected disclosure was a contributing factor in the action against him, the Board will not order corrective action if the agency shows by clear and convincing evidence that it would have taken the same action absent the disclosures. *See McDaid v. Department of Housing & Urban Development,* 46 M.S.P.R. 416, 421 (1990). To determine whether an agency has met its burden to prove by clear and convincing evidence that it would have taken the same action absent the appellant's protected activity, the Board considers the strength of the evidence in support of the personnel action, the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision, and any evidence that the agency takes similar actions against employees who are not whistleblowers but who are

otherwise similarly situated. *Caddell v. Department of Justice*, 66 M.S.P.R. 347, 351 (1995), *aff'd*, 96 F.3d 1367 (Fed. Cir. 1996).

Here, the record shows that the agency had a non-retaliatory reason for disciplining the appellant, his proven misconduct. I find the agency introduced convincing evidence in support of its charges. The appellant's disclosures were not directed at either Piacesi or Monaghan. No evidence was introduced concerning similar actions taken against employees who were not whistleblowers, but I find that removal was well within the tolerable limits of reasonableness under the circumstances of this case. Accordingly, I find that the agency proved by clear and convincing evidence that it would have removed the appellant even absent the appellant's protected disclosures. *See Scott v. Department of Justice*, 69 M.S.P.R. 211, 241 (1995), *aff'd*, 99 F.3d 1160 (Fed. Cir. 1996) (Table).

The appellant did not prove his claim of national origin discrimination.

I issued an order in which I set forth the applicable legal standards concerning the appellant's defense of discrimination and what would be necessary for the appellant to meet his burden of proof. *See* AF, Tab 4. The appellant did not introduce any evidence to support his defense. He is a member of a protected group (Puerto Rican), but he introduced no evidence to show, with respect to his removal, that he was treated more disparately compared to an individual who was not a member of his protected group. He did not identify a specific employment practice which he challenged as responsible for statistical disparities and show that the application of the particular practice created the disparate impact. Nor did he introduce direct evidence of discrimination.

Thus, I find he failed to establish a prima facie case of discrimination. Even if the appellant had established a prima facie case of discrimination, he did not overcome the agency's articulated, nondiscriminatory reasons for its action, his proven misconduct. The appellant did not show that the agency's stated reasons for removing him were merely a pretext for discrimination. Accordingly, I find the appellant did not prove his claim of discrimination.

The agency established a nexus between appellant's misconduct and the efficiency of the service.

The agency must demonstrate that the appellant's removal was "for such cause as will promote the efficiency of the service," i.e., that there is a "nexus" between the sustained charges and the efficiency of the service. *See* 5 U.S.C. § 7513(a). I find that the agency established the requisite nexus. *See Webster*, 911 F.2d at 686; *Redfearn*, 58 M.S.P.R. at 316.

The penalty of removal was reasonable under the circumstances of this case.

The Board will review an agency-imposed penalty only to determine if the agency conscientiously considered all the relevant factors and exercised management discretion within tolerable limits of reasonableness. *See Canevari v. Department of the Treasury*, 50 M.S.P.R. 311, 317 (1991); *Douglas*, 5 M.S.P.R. at 306. Only if the Board finds that the agency failed to weigh the relevant factors, or that the agency's judgment clearly exceeded the limits of reasonableness, is it appropriate for the Board then to specify how the agency decision should be corrected to bring the penalty within the parameters of reasonableness. *Id.* I find that the agency's deciding official carefully weighed and balanced all relevant factors in reaching his decision to remove the appellant. I further find that, under the circumstances of this case, the agency's decision to remove the appellant did not exceed the tolerable limits of reasonableness. *See Douglas*, 5 M.S.P.R. at 306.

In reaching its decision to remove the appellant, the agency relied on two prior disciplinary actions: a reprimand dated February 10, 1995, for insubordination and a 5-day suspension effective October 28, 1996, for disrespectful conduct. The suspension was based on an outburst by the appellant on April 19, 1996, in a meeting with Bernard Tadley, Acting RIGA, and Ruiz in which he leapt from his chair, threw a note-pad and pen against a wall, yelled "damn it" in Spanish, and rushed back to his work area. The record shows that the suspension was in writing, is a matter of record, and the appellant grieved it. I do not find that the action was clearly erroneous. I find the agency could consider the suspension in deciding to remove the appellant. *See Bolling v. Department of the Air Force*, 9 M.S.P.R. 335, 340 (1981) (where appellant was informed of prior

action in writing, the action is a matter of record, and the appellant was given the opportunity to dispute the charges to a higher lever, then only limited review of the record of the prior action is warranted and it will be discounted only if found to be clearly erroneous.)

The appellant contends that the suspension was in reprisal for whistlebloing. I disagree. The suspension was proposed by Tadley and issued by Geraldine Jasper, neither of whom had anything to do with the appellant's alleged whistleblowing which was directed at Rios. Nor did the appellant establish any connection between his alleged whistleblowing and his outburst. I find that the suspension does not evidence retaliatory animus by the agency.[2] *Cf. Cosgrove v. Department of the Navy,* 59 M.S.P.R. 618, 625 (1993) (in an individual right of action appeal, where an employee has met his burden of proof showing retaliation for whistleblowing was a contributing factor to the action at issue, it is not error for the administrative judge to closely examine the appellant's past record for further evidence of possible retaliatory animus by the agency).

In his decision notice, Monaghan cited a number of incidents of misconduct which came before the misconduct on which the decision to remove was based. The agency characterized these incidents, as being in the nature of non-disciplinary counselings which put the appellant on notice of what the agency considered to be unacceptable conduct. I find the agency was entitled to consider these matters in reaching its decision to remove the appellant. *See Thomas v. Department of Defense,* 66 M.S.P.R. 546, 553, *aff'd,* 64 F.3d 677 (Fed. Cir. 1995) (Table). At the outset of the hearing, the agency stipulated that it erred in considering the reprimand since it was time-barred. See HTI at 13-17. I find, without considering the reprimand, that the penalty of removal was within the bounds of reasonableness for the proven misconduct.

DECISION

The agency's action is AFFIRMED.

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[2] The 5-day suspension was the subject of an individual right of action appeal which was dismissed for lack of jurisdiction. *See Nater v. Department of Education,* MSPB Docket No. NY-1221-98-0272-W-1 (Initial Decision, March 2, 1999).

FOR THE BOARD (signed by:) Joseph A. Hallock
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on April 22, 1999, unless a petition, for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if this initial decision is received by you more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition, with supporting evidence and argument, must be filed with:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, NW., Room 806
Washington, DC 20419

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be postmarked, faxed or hand-delivered no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. If you fail to provide a statement with your petition that you have

either mailed, faxed, or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

EQUAL OPPORTUNITY COMMISSION REVIEW

If you disagree with the Board's final decision on discrimination, you may obtain further administrative review by filing a petition with the EEOC no later than 30 calendar days after the date this decision becomes final. The address of the EEOC is:

Office of federal operations
Equal Employment Opportunity Commission
P.O. Box 19848
Washington D.C. 20036

JUDICIAL REVIEW

If you do not want to file a petition with the EEOC, you may ask for judicial review of both discrimination and nondiscrimination issues by filing a civil action. If you are asserting a claim under the Civil Rights Act or under the Rehabilitation Act, you must file your appeal with the appropriate United States district court as provided in 42 U.S.C. § 2000e-5. If you file a civil action with the court, you must name the head of the agency as the defendant. See 42 U.S.C. § 2000e-16(c). To be timely, your civil action under the Civil Rights Act, 42 U.S.C. 2000e-16(c) must be filed no later than 30 days from the date this initial decision becomes final. If you are asserting a claim under the Age Discrimination in Employment Act, your claim must be filed with the appropriate United States district court as provided in 29 U.S.C. § 633a(c). You may have up to 6 years to file such a civil action. See 28 U.S.C. § 2401(a).

If you choose not to contest the Board's decision on discrimination, you may ask for judicial review of the nondiscrimination issues by filing a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, D.C. 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 60 calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with Board's regulations.

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record. This disposition will appear in tables published periodically.

United States Court of Appeals for the Federal Circuit

99-3083, -3143, -3213

RAFAEL NATER,
Petitioner,
v.
DEPARTMENT OF EDUCATION,
Respondent.

Decided: May 9, 2000

Before MICHEL, LOURIE and SCHALL, Circuit Judges.
PER CURIAM.

Rafael Náter ("Náter") appeals three initial decisions of the Merit System Protection Board ("Board"), rendered final either by the Board's denial of his petition for review or by Náter failure to petition for review. Náter also appeals the Board's refusal to consider his untimely submission in connection with his petition for review of the Board's first initial decision. We affirm.

BACKGROUND

I. Appeal No. 99-3083

Náter worked for the Department of Education ("the agency") as an auditor in the Office of Inspector General in San Juan, Puerto Rico. In 1990,

Náter notified Thomas Whiting, his second-level supervisor, that his immediate supervisor, Porfirio Rios, had allegedly misused a government credit card. In 1994, Náter filed an internal grievance alleging irregularities in his office's auditing methods.

In 1995, Náter submitted a reprisal claim to the Office of Special Counsel ("OSC"), alleging that the agency had retaliated against him for his 1990 and 1994 disclosures by awarding him only a "fully successful" rating rather than a superior rating in 1994 and by failing to select him for a promotion in 1995. OSC investigated Náter's allegations, but closed its inquiry on February 21, 1996 without taking any action.

On May 13, 1996, Náter filed his first individual right of action ("IRA") appeal with the Board, see Docket No. NY-1221-96-0334-W-1, reiterating his claim to OSC. In an initial decision, the Administrative Judge ("AJ") determined that Náter's 1990 disclosure qualified as a protected disclosure under the Whistleblower Protection Act ("WPA"), 5 U.S.C. § 2302(b) (1994). The AJ also found that Náter's 1994 grievance was not a protected whistleblower activity, and determined that the disclosures supporting the grievance merely "revolved around a difference of opinion among accounting professionals as to application of regulations to working papers," and thus were not protected disclosures. The AJ further found that Náter's 1990 disclosure was not a contributing factor in his 1994 performance appraisal, since Náter's 1990-1993 performance appraisals had all been "superior," the only evidence of Rios's opinion of Náter indicated that it was highly laudatory, and Náter offered no evidence that Rios was aware

of Náter's 1990 disclosure. Assuming for the sake of argument that Náter's 1994 grievance also qualified as a protected disclosure, the AJ also found that this disclosure did not contribute to his 1994 performance appraisal, since there was no evidence that any of Náter's supervisors either desired or had any opportunity to retaliate against Náter for his 1994 disclosure. Consequently, the AJ denied Náter's request for corrective action.

Náter petitioned to the Board for review of the AJ's initial decision. On November 3, 1998, the Board denied Náter's petition. The Board also declined to consider an untimely reply brief by Náter because he failed to show good cause for his tardiness. Náter now appeals to this court.

II. Appeal No. 99-3143

During the proceedings discussed above, Náter filed a second IRA, alleging that the agency had acted in reprisal for his earlier grievances and for his filing an Equal Employment Opportunity ("EEO") complaint related to his 1990 and 1994 disclosures by giving him a performance rating of "unacceptable" in 1997. After OSC terminated its investigation without acting upon Náter's claim, Náter appealed to the Board. See Docket No. NY-1221-98-0401-W-1.

On December 31, 1998, the AJ dismissed Náter's second IRA appeal for lack of jurisdiction. The AJ first noted that disclosures made only in grievances or in EEO complaints are not protected under the WPA. The AJ further found that Náter's disclosures of alleged irregularities in the agency's auditing department were nothing more than professional disagreements, which did not rise to the level of protected disclosures, and therefore dismissed Náter's appeal

for lack of jurisdiction. Náter did not petition for review of the AJ's initial decision, which consequently became final on February 4, 1999. Náter now appeals to this court.

III. Appeal No. 99-3213

Náter initiated a third IRA, alleging that the agency had acted in reprisal for his whistleblower activities and his EEO complaint by giving him low performance appraisals in 1996-1997 and by suspending him for five days in 1996. After OSC terminated its investigation without acting upon Náter's claim, Náter appealed to the Board. See Docket No. NY-1221-98-0272-W-1.

On March 2, 1999, the AJ dismissed Náter's third IRA appeal for lack. of jurisdiction. The AJ held that Náter's grievance and his EEO complaint could not serve as the basis for Board jurisdiction over his 1996 performance appraisal and suspension because those actions were not protected disclosures. The AJ further found that Náter's disclosures of alleged irregularities in the agency's auditing department were nothing more than professional disagreements, which did not rise to the level of protected disclosures. With respect to the 1997 performance appraisal, the AJ determined that Náter had appealed to the Board prior to his complaint to OSC; thus, he had failed to exhaust all proceedings before OSC. Since Náter failed to file a petition for review, the AJ's initial decision became final on April 6, 1999. Náter now appeals to this court.

DISCUSSION

We must affirm a Board decision unless it is (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without

procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence. See 5 U.S.C. § 7703(c).

To establish jurisdiction over an IRA appeal before the Board, an employee bears the burden of showing by a preponderance of the evidence that he or she engaged in whistleblower activity by making a disclosure protected [:)y 5 U.S.C. § 2302(b)(8). The employee must establish that he or she reasonably believed that the disclosure evidenced a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, abuse of authority, or a substantial and specific danger to public health or safety. See 5 U.S.C. § 2302(b)(8). The employee must also demonstrate that, in response to the protected disclosure, the agency threatened to take or took an adverse personnel action against him or her. See 5 U.S.C. § 2302(a)(2).

I. Appeal No. 99-3083

Náter contends that the Board erred by concluding that his 1990 and 1994 disclosures did not contribute to his 1994 performance appraisal of only "fully satisfactory." Among other things, Náter emphasizes that he disclosed auditing irregularities to Rios continually between 1990 and 1994, and not merely in isolated occasions in 1990 and 1994. Náter also suggests that we should overrule Carter v. Department of the Army, which explains that the filing of a grievance is not a protected disclosure since it falls under 5 U.S.C. § 2302(b)(9), not 5 U.S.C. § 2302(b)(8). 62 M.S.P.R. 393, 402 (1994).

Náter also argues that the Board erred by refusing to accept his untimely reply brief, and offers several justifications for his tardiness. Among other things,

Náter contends that: (1) the agency did not use the United States Postal Service, to send him a copy of its response, as evidenced by the lack of a postmark on the envelope; (2) the agency improperly sent its response to his former address, and (3) Náter's reply brief contained new and material evidence.

We hold that substantial evidence supports the Board's conclusion that Náter's 1990 disclosure was not a contributing factor in the. agency's alleged lowering of his 1994 performance appraisal. Even assuming, as Náter alleges, that he continuously reported auditing irregularities between 1990 and 1994, his higher performance ratings between 1990 and 1993 belie his contention that the agency acted in reprisal for these alleged disclosures or for his 1990 disclosure involving the credit card misuse.

We also hold that substantial evidence supports the Board's finding that Náter failed to demonstrate that his supervisors had any desire or opportunity to retaliate against Náter for his disclosures. We decline Náter's invitation to overrule the Board's decision in Carter, since its logic is supported by our own decision in Serrao v. Merit Systems Protection Bd., 95 F.3d 1569, 1575 (Fed. Cir. 1996).

Finally, we hold that the Board did not abuse its discretion in declining to consider Náter's untimely filing. Although the Board had the discretion to permit the untimely filing if Náter demonstrated that good cause justified his tardiness, see 5 C.F.R. § 1201.114(f), the Board found that Náter had failed to carry his burden. We note that Náter's justifications for his tardiness cannot demonstrate good cause for his delay. Náter suggests that the agency caused his delay in

submitting his reply brief by failing to send him its response in a timely manner. Náter's argument assumes, however, that he had a right to file a reply brief upon receipt of the agency's response. He did not. Section 1201.114(i) mandates that the agency's response must be submitted within twenty-five days after the employee serves the petition for review, and that the record closes on this same date. The regulation provides neither the opportunity nor the right to reply to an agency response. Additionally, although Náter baldly claims that his untimely filing contained new and material evidence, he fails to demonstrate why he was unable to submit this evidence despite due diligence before the record closed twenty-five days after Náter served the petition for review. Thus, the AJ's decision was supported by substantial evidence.

II. Appeal Nos. 99-3143 and 99-3213

In dismissing Náter's second and third IRA appeals for lack of jurisdiction, the AJ determined that Náter's 1990 grievance and 1994 EEO complaint were not protected disclosures under 5 U.S.C. § 2308(b)(8). Náter contends that the AJ erred in dismissing these appeals for lack of jurisdiction, since his disclosures qualified as protected disclosures under the WPA. Náter also argues that the agency abused its authority in appraising his performance and acted arbitrarily and capriciously.

We hold that the AJ correctly dismissed Náter's second and third IRA appeals for lack of jurisdiction. Náter demonstrates no error in the AJ's application or interpretation of the relevant statute and regulations. In particular, Náter fails to demonstrate how his disclosures were anything other than

"professional disagreements" over accounting policies, which do not rise to the level of protected disclosures. See Caroline v. Department of the Interior, 63 M.S.P.R. 684, 692, pet. for review dismissed, 43 F.3d 1485 (Fed. Cir. 1994), overruled in part on other grounds. Thomas v. Department of the Treasury, 77 M.S.P.R. 224, 236 n.9 (1998). Although Náter repeatedly contends that the agency abused its authority and acted arbitrarily and capriciously, Náter fails to explain, much less demonstrate, how the Board did so in deciding second and third IRA appeals. Consequently, we discern no reason to disturb the Board's determination that Náter made no protected disclosures under the WPA. Therefore, the dismissals were based on substantial evidence.

Accordingly, we affirm the decision of the Board in all respects.

United States Court of Appeals for the Federal Circuit

ORDER

Before MICHEL, Circuit Judge, LOURIE, Circuit Judge, and SCHALL, Circuit Judge.

A petition for rehearing having been filed by the PETITIONER, UPON CONSIDERATION THEREOF, it is ORDERED that the petition for rehearing be, and the same hereby is, DENIED.

The mandate of the court will issue on July 13, 2000.

FOR THE COURT,

(sign by)

Jan Horbaly
Clerk

Dated: July 6, 2000

FILED
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT

JUL 6 - 2000

JAN HORBALY
Clerk

cc: RAFAEL NATER
DAVID B. STINSON

NATER V EDUCATION, 99-3083, -3143,-3213
(MSPB - NY1221960334-W-1, NY1221980401-W-1,
NY1221980272-W-1, NY1221980272-S-1)

Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

RAFAEL NATER (pro-se) *

Plaintiff *

V. * CIVIL NO. 99-1366 (JP)

RICHARD RILEY, SECRETARY OF U.S. DEPARTMENT OF EDUCATION, *

Defendant *

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U.S. District Court
Old San Juan, P.R.

OPINION AND ORDER

I. INTRODUCTION

The Court has before it Plaintiff Rafael Náter's motion for Summary Judgment **(docket No. 60);** Defendant Richard Riley, Secretary of the U.S. Department of Education's Motion to Dismiss Complaint and for Summary Judgment **(docket No. 61);** Plaintiff Rafael Náter's Opposition to Defendant's motion (docket No. 63); Defendant's Reply (docket No. 67) ; and Plaintiff's Sur-Reply (docket No. 68). Also before the Court is Defendant's Motion to Dismiss Plaintiff's Puerto Rico Claims **(docket No. 15)** and Plaintiff's Opposition. thereto (docket No. 20).

Plaintiff formerly worked as an Auditor with the United States Department of Education, Office of the Inspector General. In the Complaint, Plaintiff, a Puerto Rican, alleges that he suffered adverse employment actions due to whistle-blowing activities; due to discrimination based on national origin, race, political ideas, and refusal to cease requesting orders, directives and comments in writing; and in retaliation for filing an administrative

discrimination complaint. The employment actions upon which Plaintiff bases his claims are three performance evaluations (1994, 1996 and 1997), his non-selection for a promotion in June 1995, a five-day suspension effective October 28, 1996, and his removal from the federal service on February 27, 1998. Defendant moves for dismissal of the Complaint under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, and further seeks summary judgment pursuant to Federal Rule of Civil Procedure 56(c).

II. LEGAL STANDARD

The Court sets forth the relevant legal standard for each ground for dismissal raised by Defendant. First, Defendant moves to dismiss Plaintiff's discrimination claims concerning his 1994, 1996, and 1997 performance evaluations, five-day suspension, and removal from federal service for lack of subject matter jurisdiction pursuant to Rule 12(b)(1). In assessing a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), the Court "reads the allegations of the complaint liberally, treating all well-pleaded facts as true and taking all inferences in favor of the Plaintiff." Negrón-Gaztambide v. Hernández-Torres, 35 F. 3d 25, 27 (1st Cir. 1994); see also Aversa v. United States, 99 F.3d 1200, 1209-10 (1st Cir. 1996). Further, the Court is "mindful that the party invoking the jurisdiction of a federal court carries the burden of proving its existence." Taber Partners, I v. Merit Builders, Inc., 987 F.2d 57, 60 (1st Cir. 1993).

Second, Defendant moves to dismiss Plaintiff's claims of discrimination based on national origin, race, and political ideas pursuant to Rule 12(b)(6). Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a defendant may, in response to an initial pleading, file a motion to dismiss the complaint for failure to state a claim upon which relief can be granted. It is well-settled, however, that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L.Ed.2d 80 (1957); see also Miranda v. Ponce Fed. Bank, 948 F.2d 41 (1st Cir. 1991). The Court must accept as true "all well-pleaded factual averments and indulg[e] all reasonable inferences in the plaintiff's favor." Aulson v. Blanchard, 83 F.3d 1, 3 (1st Cir. 1996) (citations omitted).

Although there is a low threshold for stating a claim, the pleading requirement is "not entirely a toothless tiger." Doyle v. Hasbro,- Inc., 103 F.3d 186, 190 (1st Cir. 1996) (quoting The Dartmouth Review v. Dartmouth College, 889 F.2d 13, 16 (1st Cir. 1989)). Thus, a Complaint must set forth "factual allegations, either direct or inferential, regarding each material. element necessary to sustain recovery under some actionable theory." Gooley v. Mobil Oil Corp., 851 F. 2d 513, 514 (1st Cir. 1988). The Court, however, need not accept a complaint's "'bald assertion' or legal conclusions" when assessing a motion to dismiss. Abbot, III v.

United-States, 144 F.3d 1, 2 (1st Cir. 1998) (citing Shaw v. Digital Equip. Corp., 82 F.3d 1194, 1216 (1st Cir. 1996)). The plaintiff has an affirmative responsibility "to put [his] best foot forward in an effort to present a legal theory that will support [his] claim." McCoy, 950 F.2d at 23.

Finally, Defendant moves for summary judgment on the grounds that no genuine issue of material fact exists for trial. Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is appropriate where, after drawing all reasonable inferences in favor of the non-moving party, there is no genuine issue of material fact for trial. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986). A fact is material if, based on the substantive law at issue, it might affect the outcome of the case. See id. at 248, 106 S. Ct. 2505; Mack v. Great Atl. & Pac. Tea Co., Inc., 871 F.2d 179, 181 (1st Cir. 1989). A material issue is "genuine" if there is sufficient evidence to permit a reasonable trier of fact to resolve the issue in the non-moving party's favor. See Anderson, 477 U.S. at 248, 106 S. Ct. 2505; Boston Athletic Ass'n v. Sullivan, 867 F.2d 22, 24 (1st Cir. 1989).

The party opposing summary judgment may not rest upon mere allegations or denials of the pleadings, but must affirmatively show, through the filing of supporting affidavits or otherwise, that there is a genuine issue for trial. See Goldman v. First Nat'l Bank of Boston, 985 F.2d 1113, 1116 (1st Cir. 1993). To survive a motion for summary judgment, "a plaintiff must establish at least, a genuine

issue of material fact on every element essential to his case in chief." Vega, 3 F.3d at 479 (quoting Mesnick v. General Electric Co., 950 F.2d 816, 823 (1st Cir. 1991)). In the context of Title VII, at the prima facie stage and with respect to plaintiff's ultimate burden of proving intentional discrimination, a plaintiff must adduce some minimally sufficient evidence to support a jury finding that he has met his burden." Id. Ultimately, the non-movant must provide specific facts supporting his claim that the real reason behind the employer's decision was discrimination or driven by "discriminatory animus." LeBlanc v. Great Am. Ins. Co., 6 F.3d 836, 841 (1st Cir. 1993), cert. denied, 511 U.S. 1018, 114 S. Ct. 1398, 128 L.Ed.2d 72 (1994); Medina-Muñoz v. R. J. Reynolds Tobacco Co., 896 F.2d 5, 9 (1st Cir. 1990).

III. UNCONTESTED FACTS

The following facts are uncontested:

A. Plaintiff was employed as an Auditor (GS-511-12) by the U.S. Department of Education, Office of the Inspector General ("The Agency") until his removal from federal service effective February 27, 1998.

B. When Plaintiff started working in the Puerto Rico office of the Agency, there was one GS-13 position which was occupied by Porfirio Rios Rojas ("Rios").

C. On October 14, 1994, Plaintiff filed a formal complaint of discrimination with the Agency's Equal Employment Opportunity Office. By letter dated February 28, 1995, the Agency's EEO Group sent a letter to Plaintiff seeking clarification of the formal complaint. Plaintiff responded by letter dated March 18, 1995. The Group's next communication was by letter dated April 6, 1998.

D. On September 27, 1999, the EEO Group wrote to plaintiff, indicating that it was dismissing his complaint of

discrimination because it received notice that Plaintiff had filed a Complaint in this Court on April 6, 1999 containing the allegations made in the complaint before the EEO Group.[1]

E. During the time period at issue for Plaintiff's 1994 performance evaluation, Rios was assigned first line supervisory responsibilities for all audits performed by the staff of the Puerto Rico office, and Thomas Whiting ("Whiting") was assigned second line supervisory responsibilities for the Puerto Rico office. Whiting was physically located in the New York office.

F. Eugene Tournour ("Tournour"), Regional Inspector - General for Audit, was the rating official for Plaintiff's 1994 performance evaluation.

G. Rios did not provide a rating for Plaintiff's performance during the 1994 performance evaluation. Plaintiff met or exceeded each of the performance objectives included in the 1994 performance evaluation and was rated as "fully successful."

H. On June 9, 1994, Rios issued a memorandum to plaintiff concerning his refusal to follow supervisory instructions.

I. On September 16, 1994, Rios issued a memorandum to Thomas Whiting, Acting Assistant Regional Inspector General, concerning an act of insubordination by Plaintiff based upon his refusal to prepare an audit program.

J. On January 20, 1995, Rios issued a memorandum to Plaintiff concerning insubordination based upon Plaintiffs refusal to prepare a survey and audit program.

K. On February 10, 1995, Tournour issued Plaintiff a letter of reprimand for insubordination.

L. In June 1995, a second GS-13 position was created at the Puerto Rico office of the Agency.

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[1] The letter further states that the EEO Group was unable to investigate the complaint because it had "sought clarification of [Plaintiff's] complaint on several occasions but was unable to secure the necessary information needed to proceed with the complaint." (Plf's Exh. 8.)

M. Plaintiff applied for a GS-511-13 Auditor position in June 1995. He was not selected for the position; Tournour selected Celia Ruiz for the position.

N. Anyone who had worked at a GS-12 position for a year could have applied to any GS-13 position in any Agency office.

O. On January 22, 1996, Rios issued a memorandum to Plaintiff admonishing him for allegedly having displayed a disrespectful attitude towards Plaintiff's supervisor, Celia Ruiz.

P. On April 20, 1996, Plaintiff filed an appeal with the MSPB alleging that he received a "fully successful-'" summary rating and was not selected for promotion to the GS-511-13 Auditor position in June 1995 in reprisal for whistle-blowing (NY-1221-96-0334-W-1) . A hearing was held on November 14, 1996 before the MSPB.

Q. By letter dated October 10, 1996, the Agency suspended Plaintiff for five days, effective October 26, 1996.

R. Plaintiff received a summary rating of "fail" for the 1996-97 evaluation period.

S. On November 17, 1997, Guido Piacesi proposed that Plaintiff be removed from federal service based on insubordination and inappropriate and unprofessional behavior. On February 25, 1998, Hugh Monaghan issued a decision removing Plaintiff from the federal service.

T. On December 18, 1997, the MSPB issued its Initial Decision in NY-1221-96-0334-W-1, denying Plaintiff's request for corrective action. The MSPB found that Plaintiff abandoned the issue of non-selection for the GS-13 Auditor position in June 1995 at the hearing. The MSPB further found that plaintiff did not make any protected disclosures, and thus failed to establish jurisdiction.

U. The issue of discrimination based upon race, national origin and/or reprisal was not adjudicated during the hearing in NY-1221-96-0334-W-1.

V. In the December 18, 1997 Initial Decision, Plaintiff was informed that he could file a petition for review of the decision with the Court of Appeals for the Federal Circuit once the decision became final. Plaintiff was also informed that he could request Board review of the initial decision by filing a petition for review with the MSPB.

W. On November 3, 1998, the MSPB denied Plaintiff's petition for review of the December 18, 1997 Initial Decision.

X. On November 23, 1998, Plaintiff filed a petition with the Equal Employment Opportunity Commission, Office of Federal Operations, for review of the MSPB's final decision in NY1221-96-0334-W-1. The EEOC issued a denial of consideration on February 22, 1999, holding that "[b]ecause the MSPB did not address any [] matters within the Commission's jurisdiction, the Commission, has no jurisdiction to review petitioner's case."

Y. Plaintiff filed an appeal (NY-1221-98-0401-W-1) alleging that his 1997 performance evaluation was in reprisal for whistle-blowing activities. In a December 31, 1998 Initial Decision, the MSPB dismissed plaintiff's appeal for lack of jurisdiction.

Z. In its December 31, 1998 Initial Decision, the MSPB informed plaintiff that he could file a petition for review of the decision with the Court of Appeals for the Federal Circuit once the decision became final. Plaintiff was also informed that he could request Board review of the initial decision by filing a petition for review with the MSPB.

AA. Plaintiff filed an appeal with the MSPB concerning his 1995-96 and 1996-97 performance appraisals; his five-day suspension; and his removal from federal service. The MSPB docketed the removal action (NY-1221-98-0272-I-1) separately from the remaining personnel actions (NY-122198-0272-W-1).

BB. In the appeal docketed NY-1221-98-0272-W-1,, Plaintiff alleged that his 1995-96 and 1996-97 performance appraisals and the five-day suspension were based on whistle-blowing activities. Plaintiff also alleged that he was discriminated against by the Agency because of his race, national origin, and political ideas.

CC. On March 2, 1999, the MSPB issued an Initial Decision in NY-1221-98-0272-W-1, dismissing the appeal for lack of jurisdiction.

DD. The MSPB informed plaintiff in its March 2, 1999 Initial Decision that he could file a petition for review of the decision with the Court of Appeals for the Federal Circuit once the decision became final. Plaintiff was also

informed that he could request Board review of the initial decision by filing a petition for review with the MSPB.

EE. The MSPB did not adjudicate the issue of discrimination in the appeals docketed NY-1221-96-0334-W-1 (1994 performance evaluation & non-selection for promotion) ; NY-1221-98-0401-W-1 (1997 performance evaluation) ; or NY-1221-98-0272-W-1 (1996 and 1997 performance evaluations and five-day suspension).

FF. Plaintiff filed an MSPB appeal of his removal from the federal service. The appeal was docketed as NY-0752-98--0297-I-1.

GG. On March 18, 1999, the MSPB issued an Initial Decision in NY-0752-98-0297-I-1, finding that it possessed jurisdiction but affirming the Agency's removal action on the grounds that the Agency proved three charges of insubordination and one charge of inappropriate and unprofessional behavior, and that the Agency would have removed the appellant absent his disclosures. The MSPB also found that Plaintiff failed to present a prima facie case of national origin discrimination.

HH. In its March 18, 1999 Initial Decision, the MSPB informed Plaintiff that he could file a petition for review of the decision with the MSPB, with the Equal Employment Opportunity Commission, with the United States District Court if plaintiff was contesting the MSPB's decision on discrimination issues, or with the United States Court of Appeals for the Federal Circuit if plaintiff chose not to contest the Board's discrimination decision.

II. Plaintiff is a member of a protected group (Puerto Rican).

JJ. All of the auditors in the Puerto Rico Office of the Inspector General were members of Plaintiff's protected group (Puerto Rican).

KK. Plaintiff filed petitions for review before the U.S. Court of Appeals for the Federal Circuit of MSPB decisions concerning the following personnel actions: 1994, 1996 and 1997 performance evaluations and the five-day suspension.

LL. In a per curiam opinion dated May 9, 2000, the Federal Circuit affirmed the MSPB's decisions concerning the 1994, 1996 and 1996 performance evaluations and the, five-day suspension.

IV. DISCUSSION

A. SUBJECT MATTER JURISDICTION

In 1978, Congress passed the Civil Service Reform Act, Pub. L. No. 95-454, 1, 92 Stat. 1111 (1978) (codified as amended in various sections of 5, 10, 15, 28, 31, 39 & 42 U.S.C. (1994)). Among other things, the Civil Service Reform Act created the Merit Systems Protection Board ("MSPB"), a independent quasi-judicial federal agency with jurisdiction to review civil service decision. See 5 U.S.C. §§ 1201-06; see also McAdams v. Reno, 64 F.3d 1137, 1141 (8th Cir. 1995). The MSPB has jurisdiction to review adverse employment actions which fall into one of five categories: removal, suspension for more than 14 days, reduction in grade, reduction in pay, or a furlough of 30 days or less. See 5 U.S.C. § 7512; see also Sloan v. West, 140 F.3d 1255, 1259 (9th Cir. 1998). It also has pendent jurisdiction over discrimination claims brought in connection with an adverse employment action by a federal agency. See 29 C.F.R. 1614.302 (2000); see also Sloan, 140 F.3d at 1259.

Federal employees asserting Title VII claims must exhaust administrative remedies as a precondition to filing a civil action in a federal district court. See Brown v. General Servs. Adm., 425 U.S. 820, 832, 96 S. Ct. 1961, 1967, 48 L.Ed.2d 402 (1976). Where a federal employee claims to have been affected by both an adverse employment action and a related Title VII violation, a so-called "mixed case," the employee may elect either to file a complaint with the relevant federal agency's Equal Employment Opportunity ("EEO")

department or to assert both claims before the MSPB in order to satisfy the exhaustion of administrative remedies requirement. See McAdams, 64 F.3d at 1141; see also 5 U.S.C. § 7702; 29 C.F.R. § 1613.403. If the employee chooses to proceed by filing a mixed case complaint before the agency's EEO, and wishes to preserve both claims, the employee must appeal the EEO decision to the MSPB[2], not to the EEOC; otherwise, the employee will be deemed to have waived the non-discrimination claim. See Sloan, 140 F.3d at 1260. Alternatively, the employee may proceed directly to the MSPB without first resorting to the agency's EEO department. See McAdams, 64 F.3d at 1141.

When a case is appealed to the MSPB, the MSPB makes threshold determination of jurisdiction. A finding by the MSPB that it lacks jurisdiction to hear a claim is appealable only to the United States Court of Appeals for the Federal Circuit. See Sloan, 140 F.3d at 1262; Synan v. Merit Systems Protection Bd., 765 F.2d 1099, 1101-02 (Fed. Cir. 1985); Ballentine v. Merit Systems Protection Bd., 738 F.2d 1244, 1247 (Fed. Cir. 1984); see also 5 U.S.C. § 7703(b)(1); 28 U.S.C. § 1295; 5 C.F.R. § 1201.120. On the other hand, if the MSPB determines that it has jurisdiction, and decides the merits of both the nondiscrimination claim and the discrimination claim, the case

[2] If 120 days have passed without a judicially reviewable action by the EEO department of the agency, the employee may appeal the matter to the MSPB even in the absence of an agency decision. See McAdams, 64 F.3d at 1141-42; 5 U.S.C. § 7702(e)(2).

becomes a "mixed case appeal."[3] See Sloan, 140 F.3d at 1261; see also 5 U.S.C. § 7703(b)(2); 5 C.F.R. § 1201.175.

A final decision by the MSPB in a mixed case appeal may then be appealed to a United States District Court. See Sloan, 140 F.3d at 1261; New v. Brown, No. 97-CV-125, 1997 WL 666173, *3 (E.D. Pa. Oct. 21, 1997). When the MSPB "does not consider the employee's claim of discrimination on its merits, review of the [MSPB's] determination that it lacks jurisdiction to hear the employee's claim lies exclusively in the Federal Circuit." Wall v. United States, 871 F. 2d 1540, 1543 (10th Cir. 1989), cert. denied, 493 U.S. 1019, 110 S. Ct. 717, 107 L.Ed.2d 737 (1990); New, 1997 WL 666173 at *3; see also 5 U.S.C. § 7703 (b). Upon appeal, the plaintiff would have to convince the Federal Circuit that it is a mixed case. If the plaintiff succeeded in that endeavor, the District Court still would not have jurisdiction over the case. Rather, the Federal Circuit would remand the case to the MSPB, and the MSPB would have to rule on the discrimination claim. See Wall, 871 F.2d at 1543; New, 1997 WL 666173 at *3. Only after the MSPB reaches a decision on the merits of plaintiff's discrimination claim would the District Court have jurisdiction. See Ballentine, 738 F.2d at 1246 ("[U]ntil the discrimination issue and the appealable action have been decided on

[3] 29 C.F.R. § 1614.302 ("A mixed case appeal is an appeal filed with the MSPB that alleges that an appealable agency auction was effected, in whole or in part, because of discrimination on the basis of race, color, religion, sex, national origin, handicap or age.").

the merits by the MSPB, an appellant is granted no rights to a trial de novo in a civil action under [5 U.S.C.] § 7702 or § 7703.").

The Court finds that Plaintiff's claims concerning his non-selection for promotion in June 1995; his 1994, 1996 and 1997 performance evaluations; and his five-day suspension are subject to dismissal for lack of subject matter jurisdiction. Over Plaintiffs removal claim, however, this Court possesses jurisdiction. The Court will discuss each of these claims in turn.

1. 1994 Performance Evaluation and Non-Selection for Promotion

Plaintiff brought an appeal before the MSPB concerning a performance evaluation for the period ending in 1994 and his non-selection for promotion to a GS-13 Auditor position in June 1995. This appeal was docketed as NY-1221-96-0334-W-1. Plaintiff alleged that the lower evaluation and his non-selection for promotion were in reprisal for having made protected disclosures under the Whistle Blowing Act. It is unclear whether Plaintiff alleged in that appeal that the negative evaluation and non-selection for promotion were motivated by discrimination. In its December 18, 1997 decision, the MSPB noted in a footnote that Plaintiff expressed that he was "looking for a review of the case [Plaintiff] presented as of October 14, 1994 to the Department of Education, EEO Division, where [Plaintiff] claimed discrimination," but the decision reflects that no factual allegations of discrimination were presented for review. (Dft's Exh. 18, at 2.) The MSPB found that it did not possess

jurisdiction over the claim because Plaintiff made no protected disclosures, and dismissed the appeal. (Dft's Exh. 18.) The MSPB did not consider Plaintiff's discrimination claim, if any, nor did it make a finding that Plaintiff's case was a "mixed case appeal." The MSPB further found that Plaintiff had abandoned his claim of non-promotion because no evidence of the same was presented at the hearing. (Id., at 8.) Plaintiff then appealed to the Federal Circuit. On May 9, 2000, the Federal Circuit affirmed the decision of the MSPB. See Náter v. Department of Educ., Nos. 99-3083, 99-3143, 99-3213, 2000 WL 565471, *3 (Fed. Cir. May 9, 2000). The Federal Circuit opinion makes no mention of any claim of discrimination raised by Plaintiff, nor of the claim of non-promotion.

Plaintiff alleges in his Opposition that he was never notified that his case was not a mixed case appeal, and for this reason was prevented from preserving his discrimination claim by arguing that issue to the Federal Circuit or by filing an EEO complain. He cites 29 C.F.R. § 1614.302(b), which states that "if a person files a mixed case appeal with the MSPB instead of a mixed case complaint and the MSPB dismisses the appeal for jurisdictional reasons, the agency shall promptly notify the individual in writing of the right to contact an EEO counselor within 45 days of receipt of the notice and to file an EEO complaint, subject to § 1614.107." Although Plaintiff has presented evidence to this Court that he stated to the MSPB that he intended to file a mixed case appeal, that stated intention does

not so transform his case. As discussed earlier, a case does not become a "mixed case appeal" unless and until the MSPB determines that it possesses jurisdiction. See Sloan, 140 F.3d at 1261. It is uncontested that the MSPB dismissed the action for lack of jurisdiction, and that the MSPB found Plaintiff to have abandoned the claim of non-promotion.

Moreover, the Court's review of the motions and the evidence before it makes clear that Plaintiff has consistently failed to present anything more than a passing reference to a claim of discrimination to the MSPB, devoid of factual allegations or evidence of the same. As the District Court for the Eastern District of New York recently observed, "a passing reference is simply insufficient to put the MSPB on notice of a [] discrimination claim, an the MSPB was evidently unaware of any such allegation in this case," Parola v. Internal Revenue Service, No. 98-CV-7179 (JG), 1999 WL 1215557, *3 (E.D.N.Y. Dec. 15, 1999). Plaintiff's attempt to shift the blame to the MSPB for its lack of treatment of Plaintiff's discrimination claim, and his suggestion that he was purposefully misguided to prevent him from seeking review of the decision, Plf's Opp. at 18, is unavailing and itself misguided. And of course, to extent the that Plaintiff deliberately declined to present evidence of discrimination to the MSPB in order to try the discrimination claim before this Court, it is well-settled that such tactics have been disapproved and result in the waiver of the discrimination claim.

See Ojiti v. Heyman, 47 F. Supp.2d 6, 7-8 (D.D.C. 1998) (citing Smith v. Horner, 846 F.2d 1521, 1524 (D.C. Cir. 1988)).

In conclusion, because the MSPB never found Plaintiff"s case to be a "mixed case appeal," this Court lacks jurisdiction to adjudicate Plaintiff's claim arising from the 1994 performance evaluation. See Ballentine, 738 F.2d at 1246. In addition, Plaintiff was found to have abandoned his non-promotion claim, and failed to raise this issue on appeal before the Federal Circuit. As such, these claims are hereby **DISMISSED.**

2. 1996, 1997 Performance Evaluations and Five-Day Suspension

Plaintiff brought an appeal before the MSPB concerning his 1996 and 1997 performance evaluations and for a five-day suspension effective October 28, 1996, alleging that these adverse agency actions were taken against him in reprisal for having made protected disclosures under the Whistle Blowing Act and that he had been discriminated against on account of race, national origin, or political ideas. These claims were docketed as case numbers NY-1221-98-0272-W-1 and NY-1221-98-0401-W-1. In a decision dated, March 2, 1999, the MSPB found that it did not possess jurisdiction over the claims because Plaintiff made no protected disclosures and that Plaintiff did not plead facts which, if true, would establish jurisdiction. (Dft's Exh. 22.) The MSPB did not consider Plaintiff's discrimination claim on the merits nor make a finding that Plaintiff's case was a "mixed case appeal." Plaintiff appealed,

and the Federal Circuit affirmed the decision of the MSPB. See Náter, Nos. 99-3083, 99-3143, 99-3213, 2000 WL 565471 at *4. The Federal Circuit makes reference to Plaintiff's EEO complaint only to the extent that Plaintiff argued before that Court that Plaintiff was retaliated against for filing an EEO complaint. See id. However, the Federal Circuit discussed that claim in the context of "protected disclosures" under the Whistle-Blowing Act, finding that the filing of an EEO complaint does not constitute a protected disclosure. Thus, in view of the uncontested fact that the MSPB never found Plaintiff's case to be a "mixed case appeal," this Court lacks jurisdiction to adjudicate these claims. See Ballentine, 738 F.2d at 1246. Therefore, the Court hereby **DISMISSES** the claims related to the 1996 and 1997 performance evaluations and the five-day suspension.

3. Removal

Plaintiff brought an appeal before the MSPB with respect to his removal from the position of Auditor, GS-12, effective February 27, 1998. Plaintiff alleged that he was removed in reprisal for having made protected disclosures under the Whistle Blowing Act and on account of national origin discrimination. This case was docketed as case number NY-0752-98-0297-I-1.

In a decision dated March 18, 1999, the MSPB found that it possessed jurisdiction over the removal claim because Plaintiff made protected disclosures. (Dft's Exh. 23.) However, the MSPB concluded that Plaintiff failed to prove that his whistle-blowing activities

were a contributing factor in his removal, and further determined that the agency proved by clear and convincing evidence that it would have removed Plaintiff absent the protected disclosures. (id.) With respect to the claim of national origin discrimination, the MSPB found that Plaintiff produced no evidence to support this claim, and thus failed to establish a prima facie case of discrimination. (id.) Because the MSPB reached the claim of national origin discrimination in relation to Plaintiff's removal, Plaintiff may properly appeal the decision to this Court. See Ballentine, 738 F.2d at 1246; see also 5 U.S.C. § 7703(b)(2).

In his Complaint, however, Plaintiff also raises claims of discriminatory removal on the basis of race and political ideas. (Compl. ¶ 17). Because the MSPB only considered the merits of Plaintiff's claim for national origin discrimination in his removal, this Court possesses jurisdiction over that claim alone. Because the MSPB did not consider the claims of discriminatory removal based on race and political ideas on the merits, these claims are hereby **DISMISSED.**[4] The Court will now proceed to assess Plaintiff's claim

[4] In the Complaint, Plaintiff alleges that he was discriminated against based in part on his political ideas and his refusal to cease requesting orders, directives and comments in writing. Discrimination on the basis of political ideas and/or a refusal to cease requesting orders, directives and comments in writing are not cognizable under Title VII. See Hernádndez-Ortiz v. Díaz Colón, 134 F.3d 361 (1st Cir. 1998) (per curiam); Parola, No. 98-CV-7179 (JG), 1999 WL 1215557, at *3. Further, Plaintiff has failed to allege any other cognizable cause of action in connection with these allegations. As such, the claim of discrimination based on political ideas is hereby **DISMISSED** on this alternative ground, and the Court further **DISMISSES** the claim of discrimination based on refusal to cease requesting orders, directives and comments in writing.

of national origin discrimination in his removal from the. federal service.

B. NATIONAL ORIGIN DISCRIMINATION IN REMOVAL

Because Plaintiff produces no direct evidence of national)rial origin discrimination in his removal, the Court applies the McDonnell Douglas burden-shifting framework. See Dominguez-Cruz v. Suttle Caribe, Inc., 202 F.3d 424, 429 (1st Cir. 2000). In McDonnell Douglas, the United States Supreme Court established an allocation of the burden of production and an order for the presentation of proof in Title VII discriminatory treatment cases. The goal of this burden-shifting framework is to "progressively . . . sharpen the inquiry into the elusive factual questions of Intentional discrimination". St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506, 113 S. Ct. 2742, 125 L.Ed.2d 407 (1993) (quoting Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 255 n. 8, 101 S. Ct. 1089, 67 L.Ed.2d 207 (1981)).

The plaintiff "carr[ies] the initial burden under the statute of establishing a prima facie case of [national origin] discrimination." McDonnell Douglas, 411 U.S. at 802, 93 S. Ct. 1817. This initial burden is not onerous. See Burdine, 450 U.S. at 253-54, 101 S. Ct. at 1094. In an employment termination case, the plaintiff establishes a prima facie case by showing that: (1) the plaintiff is within a protected class; (2) he was performing his jot) at a level

that met the employer's legitimate expectations; (3) he was nevertheless dismissed; and (4) the employer sought someone of roughly equivalent qualifications to perform substantially the same work after his departure. See Mulero-Rodríguez v. Ponte, Inc., 98 F.3d 670, 673 (1st Ci.. 1996) ; Lipsett v. University of Puerto Rico, 864 F.2d 881, 899 (1st Cir. 1988) . It is uncontested that Plaintiff is Puerto Rican, and thus within a protected class, and that he was removed from his position as Auditor with the Defendant Agency. A careful review of the Complaint reveals, however, that Plaintiff fails to allege that he was performing his job at a level that met the employer's legitimate expectations, or that Plaintiff's employer sought someone of roughly equivalent qualifications perform substantially the same work after his departure. Because Plaintiff failed to allege the elements of a prima facie case, the Court hereby **DISMISSES** Plaintiff's claim of discriminatory removal or@ the basis of national origin discrimination.

In the alternative, the Court finds that even if Plaintiff had properly plead the elements of a prima facie case of national origin discrimination in his removal, Defendant would be entitled to summary judgment. Once a plaintiff establishes a prima facie case, the burden shifts to the employer to articulate a "legitimate, nondiscriminatory reason" for discharging the plaintiff. See McDonnell Douglas, 411 U.S. at 802, 93 S. Ct. 1817; Lipsett, 864 F.2d at 899. "[The defendant must clearly set forth, through the introduction of admissible evidence, reasons for its actions which,

if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action." Hicks, 509 U.S. at 507, 113 S. Ct. 2742. Once the defendant has met its burden of production in this regard, the plaintiff is then given the opportunity "to demonstrate that the proffered reason was not the true reason for the employment decision, but was instead prerextual." Lipsett, 864 F.2d at 899 (internal quotations omitted) . Plaintiff's burden of proving pretext merges with the ultimate burden of persuading the court that the plaintiff has been the victim of intentional discrimination. See Burdine, 450 U.S. at 256, 101 S. Ct. at 1095 (citing McDonnell Douglas, 411 U.S. at 804-05) . The plaintiff thus may satisfy its burden either by proving pretext or by proving that the employer was more likely motivated by discriminatory intent. See id.

In the summary judgment context, a plaintiff must show evidence sufficient for a fact finder to reasonably conclude that the employer's decision to terminate was driven by a discriminatory animus. See LeBlanc, 6 F.3d at 843. If the record is "'devoid of adequate direct or circumstantial evidence of the employer's discriminatory intent," the entry of summary judgment for the employer is appropriate. See Mulero-Rodrígruez, 98 F.3d at 673 (citing Pages-Cahue v. Iberia Líneas Aéreas de España, 82 F.3d 533, 537 (1st Cir. 1996)).

Defendant has come forward with evidence to show that Plaintiff was dismissed for insubordination in satisfaction of its burden of

production. By memorandum dated June 9, 1994, Plaintiff's supervisor, Rios, admonished Plaintiff for failure to follow Rios' instructions. (Dft's Exh. 6.) Rios again issued memoranda to Plaintiff on September 16, 1994 and January 20, 1995, admonishing Plaintiff after he allegedly refused to prepare audit programs as directed by his supervisor. (Dft's Exhs. 7, 8.) Then, on February 10, 1995, Tournour, the Regional Inspector General for Audit of the Defendant Agency, issued Plaintiff an official reprimand for insubordination. (Dft's Exh. 10.) On January 22, 1996, Rios issued a memoranda to Plaintiff admonishing him for Plaintiff's alleged disrespectful attitude towards his supervisor, Celia Ruiz. (Dft's Exh. 9.) And on October 10, 1996, Plaintiff was notified of a decision to suspend him for five days, effective October 28, 1996, for disrespectful conduct during a meeting with Bernard Tadley and Celia Ruiz on April 19, 1996, during which Plaintiff was alleged to have leapt from his chair, thrown a note-pad and pen against the wall, yelled "damn it" in Spanish, and rushed back to his work area. (Dft's Exh. 11.)

Plaintiff has come forward with no evidence to suggest Defendant's proffered reason for Plaintiffs dismissal was pretextual or to show that his employer intentionally discriminated against him. In a recently decided case, the First Circuit addressed precisely such a scenario, affirming the district court's entry of summary judgment against a plaintiff suing under Title VII. See Williams v. Raytheon Co., 220 F.3d 16 (1st Cir. 2000). In Williams, the

plaintiff alleged that he had been terminated from his employment on account of gender discrimination. The employer proffered a legitimate non-discriminatory justification for the plaintiff's termination; namely, that plaintiff had been terminated for insubordination. Notwithstanding plaintiff's contention that such justification was a pretext for discrimination, the district court entered summary judgment against plaintiff. See id. at --. The First Circuit affirmed, observing that the plaintiff "made no showing, much less a substantial showing, that the insubordination justification was false." Id. at --. The First Circuit went on to assess the circumstantial evidence before it to determine whether it would permit a reasonable juror to find that plaintiff sustained its burden of proving intentional discrimination. In so doing, it found that the decision-maker had hired individuals of the plaintiff's gender, and that, other than a few stray remarks, the evidence did not support a reasonable inference of intentional discrimination. See id. at --.

Similarly, in the case at bar Plaintiff submitted no evidence of pretext. It is uncontested that Plaintiff was issued memoranda for insubordination and disrespectful conduct on several occasions, was issued a formal reprimand on one occasion, and was placed on a five-day suspension for disrespectful conduct. Further, Plaintiff has come forward with no circumstantial evidence of intentional discrimination. It is uncontested that all of the auditors at the Puerto Rico office of the Inspector General were Puerto Rican and

therefore, as in Williams, because the same decision-makers hired Puerto Ricans as Auditors, the evidence suggests that Defendant did not act out of discriminatory purpose. See id. at --. Because Plaintiff did not make a substantial showing that the proffered justification for his removal was false, and there is no evidence upon which to support a reasonable inference of intentional discrimination, the Court hereby **DISMISSES** the claim of national origin discrimination.

C. REMOVAL BASED UPON WHISTLE-BLOWING ACTIVITIES

Because the Court has dismissed the discrimination claim for removal, it declines to exercise jurisdiction over the non-discrimination claim for removal based upon whistle-blowing activities. See Afifi v. Department of Interior, 924 F.2d 61, 64 (4th Cir. 1991) (district court has discretion to retain jurisdiction over non-discrimination claim after dismissal of discrimination claim). Section 1631 provides for the transfer of an action to "any other such court in which the action or appeal could have been brought at the time it was filed or noticed," if such is in the interests of justice. 28 U.S.C. § 1631. Thus, Plaintiff's MSPB appeal may be transferred to the Federal Circuit if the action could have properly been brought in the Federal Circuit at the time that it was filed here and if transfer would be in the interests of justice. See Franchi v. Manbeck, 947 F.2d 631, 634 (2nd Cir. 1991).

Under 5 U.S.C. § 7703(b)(1), a petition for judicial review must be filed in the Federal Circuit "within 60 days after the date the

petitioner received notice of the final order or decision of the Board." Here, the MSPB issued its decision on March 18, 1999, and Plaintiff filed this action on April 6, 1999. Thus, this action would have been timely if it had been filed in the Federal Circuit. Further, interests of judicial economy dictate that the Federal Circuit, as a specialized forum, is best suited to review Plaintiff's non-discrimination claim for removal based upon whistle-blowing activities. See Phillips v. Seiter, 173 F.3d 609, 610 (7th Cir. 1998) (a court can transfer a case to another forum even if not asked to do so by either party) (citing Rodriguez-Román v. Immigration & Naturalization Service, 98 F. 3d 416, 423 n. 9 (9th Cir. 1996)) . The Court further believes that such transfer is fair, as it preserves Plaintiff's right to review when it otherwise may be barred by the statute of limitations, and presents no inconvenience to either party to file pre-existing documents with the Federal Circuit rather than with this Court. Therefore, pursuant to 28 U.S.C. § 1631, this Court hereby **TRANSFERS** this claim to the Federal Circuit for review.

D. PUERTO RICO LAW CLAIMS

In the Complaint, Plaintiff states that he invokes the pendent jurisdiction of this Court under the laws of Puerto Rico.. Yet, the Complaint fails to state what Puerto Rico laws, if any, he seeks to invoke as a basis for recovery. Defendant moves dismiss to Plaintiff's state law causes of action on the grounds that the Civil Service Reform Act's ("CSRA") comprehensive scheme provides the exclusive remedy for federal employee complaints of prohibited

personnel Practices. See Roth v. United States, 952 F. 2d 611, 614-16 (1st Cir. 1991) ; Berrios v. Department of Army, 884 F. 2d 28, 31-32 (1st Cir. 1989). Defendant further moves for dismissal of any state law claims because, with respect to claims of discrimination in federal employment, Title VII of the Civil Rights Act of: 1964, as amended by the Civil Rights Act of 1991, provides the exclusive remedy. See Brown v. General Services Admin., 425 U.S. 820, 834-35, 96 S. Ct. 1961, 1968-69, 48 L.Ed.2d 402 (1976).

In his Opposition, Plaintiff responds that "the laws of Puerto Rico may became [sic] applicable and therefore, should be accepted as another cause of action." (Plf's Opp. at 2.) He further argues that the Complaint alleges "abusive practices, . . . tort, entrapment, and other illegal, unethical, immoral, and even bizarre activities . . . " which may be actionable under Puerto Rico law. This description leaves considerable ambiguity as to the precise nature of the claims Plaintiff intends to raise under Puerto Rico law. Notwithstanding, the Court finds that in light of the factual allegations set forth in the Complaint, Plaintiff seeks to invoke Puerto Rico law for redress of prohibited personnel practices or for discrimination. Because such causes of action are preempted by federal law, the Court hereby **DISMISSES** Plaintiff's Puerto Rico law claims. See Roth, 952 F.2d at 616 ("In general, a federal employee whose position comes with CSRA's reach may seek redress for the untoward effects of a prohibited personnel practice only through the

panoply of remedies that CSRA itself affords."); Brown, 425 U.S. at 834-35, 96 S. Ct. 1968-69.

V. CONCLUSION

In view of the foregoing, the Court hereby **DISMISSES** the Complaint, with the exception of the claim of removal in reprisal for whistle-blowing, which is hereby **TRANSFERRED** to the United States Court of Appeals for the Federal Circuit pursuant to 28 U.S.C. § 1631. The claim for discrimination in Plaintiff's removal from the federal service is hereby **DISMISSED WITH PREJUDICE.**

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 13 day of September, 2000.

(signed by:)

JAIME PIERAS, JR.
U.S. SENIOR DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

RAFAEL NATER (pro-se)	*	
Plaintiff	*	
v.	*	CIVIL NO. 99-1366 (JP)
RICHARD RILEY, SECRETARY OF U.S. DEPARTMENT OF EDUCATION,	*	Received and Filed 2000 Sep 14 PM 2:37
Defendant	*	Clerk's Office Annex U.S. District Court Old San Juan, P.R.

FINAL JUDGMENT

Pursuant to the Opinion and Order of this same date, the Court hereby enters **JUDGMENT, DISMISSING** all causes of action raised in Plaintiff's Complaint and Amended Complaint except the non discrimination claim for Plaintiff's removal from federal service, which is hereby **TRANSFERRED** to the United States Circuit Court of Appeals for the Federal Circuit. The claim for discrimination in Plaintiff's removal from the federal service is hereby **DISMISSED WITH PREJUDICE.**

IT IS SO ORDERED AND ADJUDGED.

In San Juan, Puerto Rico, this 13th day of September, 2000.

(sign by)

JAIME PIEDRAS, JR.
U.S. SENIOR DISTRICT JUDGE

A 72A
(Rev.8/82)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

RAFAEL NATER (pro-se)	*	
Plaintiff	*	
v.	*	CIVIL NO. 99-1366 (JP)
RICHARD RILEY, SECRETARY OF U.S. DEPARTMENT OF EDUCATION,	*	
Defendant	*	

Opposition to Defendant's Motion For Dismissal And for Summary Judgement

TO THE HONORABLE COURT:

Comes now plaintiff, Rafael Náter, pro-se and through his co-counsel, very respectfully states and prays as follows:

3.3 Argument

A. As showed by the facts described above, ***plaintiff exhausted*** all corresponding ***administrative remedies*** and submitted the corresponding ***allegations within the allowable time*** in relation to each cause of action. Therefore, defendant's allegation VII (p.18 of their motion) must fall as plaintiff complied with applicable requirements.

Defendant prays under Fed. R. Civ. P. 12(b)(6) must be rejected too. It is not doubtful plaintiff posed, with documentary evidence (and even evidence produced by the agency) and with corresponding affidavits, that defendant discriminated as prohibited by law and took reprisal against plaintiff; also defendant took reprisal because plaintiff's reports of irregularities by defendant. As a note, please be aware that defendant really did not present arguments supporting this pray, but mixed this pray with their arguments related to timeliness of the actions under section VII of their motion.

B. Then, we posed ***it is reasonable to conclude with certainty that this Honorable Court does have jurisdiction over all allegations*** (discrimination and nondiscrimination) and causes of actions from Federal Circuit case no. 99-3236 (MSPB: NY 0752-98-0297-I-1). Also, it is reasonable to conclude that it is properly before this Court all allegations and causes of action from the complaint with the agency in ED-9501000, as well as EEOC-03990023.

C. As to defendant's allegations under section VI (p. 17 of their motion), "allegations of discrimination based on political ideas ..." But defendant's description is incorrect. Plaintiff claimed ***discrimination based on political ideas, and TORT action*** by the agency by harassing and through threats intended to avoid plaintiff documenting the irregular orders and directives by, among others, ordering and threatening plaintiff if he did not stop asking for orders, directives and review comments in written form. In relation to this matter, we filed (September 1999) a motion entitled "**In Opposition to Defendant's Motion to Dismiss Plaintiff's P.R. Claims**", and, by reference, we are making that motion part of this motion. In essence, we explain why all the subjects there included were part of this case, and why this Court does have jurisdiction to entertain those claims. Therefore, all the claims in that September 1999 motion is part of this action and the Court should entertain all of them.

D. The Ira Appeals

We submit that in this peculiar case this Court also should entertain all the allegations and

review all the causes of actions from MSPB cases NY-1221-96-0334-W-1, NY-1221-98-0272-W-1, NY-1221-98-0272-S-1, NY-1221-96-0401-W-1; i.e., the IRA appeals. For this decision, please considers the definition of MIX case COMPLAINT, and MIX case APPEAL as provided by 29 C.F.R. 1614. 302(a). It is clear plaintiff properly files these cases at the Board based on 5 C.F.R. 1209.2, and .5(a), section 1201.151(a), and .154(a) and (b). Plaintiff also exhausted all reasonable administrative remedies in the first case, by filing PFR with the Board as authorized under 5 C.F.R. 1201.114 to .120.

It is undisputed that these regulations also authorize the filing of mix case appeals and mix case complaints with the corresponding District Court, or with the EEOC, or with the Federal Circuit, **or with the EEO of the agency.** This latter option should have been notified to plaintiff by the agency (or at least by the MSPB) - 29 C.F.R. 1614.302(b), but it was not - until the cases were already before the Federal Circuit and before the District Court. This action clearly misguided plaintiff and appears to have been done purposely.

Defendant, in essence, claims applicability of Rule 12(b)(1) because: (i) the prohibition of having "two bites from the same apple", and because (ii) is the MSPB who determines if the case is or not a Mix case Appeal. We want to distinguish the case at bar from the cases supporting defendant's contention.

First lets recall some relevant and pertinent facts. After the administrative process before the agency and later with the MSPB, plaintiff filed with EEOC and with Fed. Cir. asking each to resolve the subjects of their "expertise". Also, notified both he filed with each other and about his believes and intentions to obtain redress, this as he specifically wrote (to the Fed. Cir. in the "Statement Concerning Discrimination) that he was not asking the Court to resolve the issues concerning discrimination in that case AS FAR AS THAT SELECTION DID NOT IMPEDE HIS RIGHT TO REQUEST REDRESS WITH THE DISTRICT COURT after EEOC resolution. Also, notified EEOC and asked to hold any decision until the Fed. Cir. completion of their review. The

agency was submitted copies of all the PFR and appeals but did not raise any issue with the EEOC claiming the EEOC lacked jurisdiction because the same case was also appealed to the Circuit. The MSPB did not entertain the allegations of discrimination in any of the IRA appealed by plaintiff. Defendant did not informed plaintiff his rights to file a complaint with the EEO division or with the District Court once the MSPB decided the IRA cases. This, as per the facts in this case, appears to be a requirement under 29 C.F.R. 1614.302(b).

Based on these facts, it is perfectly reasonable to conclude that plaintiff intended at all times to have his case treated as ONE case of MIX allegations (discrimination and irregular activities), and that he informed all the concerning bodies of his allegations and about these intentions; he did not hide these facts and intentions from any of the bodies where he filed the allegations.

(i). Ojiti v. Heyman, 47 F. Supp.2d 6 (D.C. Dist 1998). In summary, Ojiti appealed to the Board which denied the corrective action prayed for and ultimately he filed PFR with the Fed. Cir. As part of the process at the Cir. (when filing the Petitioner's Statement Concerning Discrimination), he selected an alternative indicating ". . . No claim of discrimination . . . has been or will be made in this case." , also, he did not answer the question related to have had file a discrimination case before any US District Court or the EEOC nor explained any related matter. The Court then, determined that in so doing, Ojiti waived his rights to proceed in District Court; the Court felt that such attitude should not be encourage because it was a tactic **designed** (this means INTENTION) TO CIRCUMVENT the Circuit effort to avoid litigants from seeking "two bites of the same apple". In essence, the Court concluded that Ojiti was intentionally manipulating his case to obtain redress based on the same causes of action in two different bodies by intentionally misleading the courts. THESE CONDITIONS DO NOT EXIST IN THE CASE AT BAR.

Clearly, plaintiff (Náter) at all times intended his case to be a mix case, and informed both bodies of his intentions to obtain review of his allegations of discrimination and non discrimination.

Further, at all times have notified all corresponding bodies of his desire of not to abandon his claims of discrimination. Based on the facts, Náter was not manipulative but defensive; i.e., at all times have been avoiding and fighting sabotage against his claims and have resorted to applicable bodies in search of justice as he understood proper. Also, from the facts, Náter intentions have never been to circumvent the Circuit efforts to avoid "two bites of the same apple" since he notified the Circuit of his intention to file with the District Court after the EEOC resolution.

Lastly, Ojiti does not appear to have claim he was not notified of his right to file (to contact the agency EEO counselor) complaint with the agency or obtain a final decision after the MSPB resolution of his case; it is , a flaw in the due process that has affected his rights. Náter does; it is, Náter is claiming the agency had a duty to have notified him after the MSPB decisions about the indicated rights, but they did not and thus, have affected his right; probably it was not notified with the intention to mislead him.

All this conditions are clearly distinguishable from Ojiti and the other cases brought to this Court attention by defendant.

(ii). The definitions of Mix cases is given at 29 C.F.R. 1614.302(a); also, it is applicable 5 C.F.R. 1201. 151.(a). In essence, if this is a complaint: a mix case is a complaint of employment discrimination related to or stemming from an action that can be appeal to the Board; if this is an appeal, a mix case is an appeal filed with the MSPB that alleges that an appealable action was effected in whole or in part because of discrimination. Please note that: (1) There is no word in the regulations indicating that it is the MSPB the body that determines that an individual has filed a mix case appeal, (2) in all IRA appeals filed by plaintiff he claimed he suffered discrimination prohibited by law and reprisal for filing the EEO complaint and reporting the allegation to the OSC (this to the point that for all these appeals defendant alleged lack of jurisdiction by the MSPB because plaintiff claim was reprisal for filing EEO complaint), (3) the MSPB, in NY-1221-96-0334-W-1 and in NY-0752-98-0297-I-1 concluded that plaintiff reported protected disclosures of the type triggering the Board's jurisdiction (5 U.S.C. 2302(b)(8)).

Accordingly, it appears that plaintiff perfectly filed mix case appeals, therefore, the MSPB should have entertained the allegations of discrimination for each of these cases.

We agree that in the case at bar, the Board did not entertain the allegations of discrimination, however, and contrary to defendant contention, it did admit jurisdiction in NY-1221-96-0334-W-1, but denied the corrective action on other grounds. Also, we know and understand that it is the judicial power the one called to make the interpretations of laws, rules and regulations. Nevertheless, the cases brought by defendant still are different to the case at bar as follow.

Parola v. I.R.S., 98-CV-7179(JG), 1999 Dist Lexis 19367 (ED NY December 15, 1999). In this case plaintiff was accused of family type offenses and even resisted arrest in his workplace; after an ordeal of events he was removed from his work. He was proposed to be removed and he did not respond nor raised any objection. However, it is apparent he raised various defenses just after his removal. He appealed to the Board and later filed PFR of the ID which was denied. The ID was a decision on the merits. Then, the District Court found that Parola did not raise the discrimination assertion at the Board[1]. Then the Court indicated: "Therefore, because Parola failed to raise the issue of race discrimination before the MSPB, his appeal is not a "mixed case appeal" and this Court is without jurisdiction to consider it." Further, the Court determined that Parola accepted he never exhausted administrative remedies. Since his appeal

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[1] In Parola, the Court relies on the following standard: ("[A] petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit."). There is an exception, however, to the Federal Circuit's exclusive jurisdiction for cases including allegations of discrimination on the basis of race, color, religion, sex, national origin, handicap, or age. n2 See *5 U.S.C. §§ 7702,* 7703(b)(2); 29 C.F.R. § 1614.302(a)(2) (1998). In such "mixed case appeals," i.e., those in which the employee alleges an appealable personnel action and prohibited discrimination, federal district courts have jurisdiction to review the MSPB's final decision. See *5 U.S.C. § 7703*(b)(2); 29 C.F.R. § 1614.302(a)(2). However, if the employee fails to raise any allegations of prohibited discrimination before the MSPB, the district court is without subject matter jurisdiction to consider [*8] the MSPB appeal. See, e.g., *Ugarte v. Johnson, 40 F. Supp. 2d 178, 181 (S.D.N.Y. 1999).*

to the Board did [not] included any cognizable allegation of discrimination it is apparent the decision was correct.

Clearly, Parola case is different to our case. Further, in our case, plaintiff did include allegations covered under the Federal Tort Act and under 28 U.S.C. 1981. Also, it is clear that plaintiff posed his discrimination allegations before the agency and later before the Board. Thus, if Parola set the review standard, then, our allegations included in the IRA cases are properly before this Court and ready for review.

Bell v. USPS, No. 98-3357, 2000 US App. Lexis 1949 (Fed Cir, February 11, 2000). In Bell the Fed. Cir. was reviewing a PFR from an MSPB decision dismissing his case due to lack of jurisdiction. He filed with the Board, but it determines not having jurisdiction over the appeal because there was no appealable action, thus did not adjudicate the allegations of discrimination alone. In essence, what the Circuit resolved in Bell was that when a mix case was presented to the Board but it declined to review the discrimination issue because lacking jurisdiction over the appealable action (since it is not authorized to review the EEO issue alone), the district court was barred from reviewing the Board decision declining jurisdiction over the appealable action because that decision is exclusive for the Fed. Cir. Then, it follows that the discrimination issue should not be reviewed by the district court until it has not been reviewed by any administrative body. I posed this is the true "Ratio Dicidendi" for Bell, Synan (Synan v. MSPB, 765 F.2d 1099, 1101-1102 (Fed Cir 1985)) and Synan progeny of cases.

Again, our case is very different and as such the decision in this case cannot follow Parola, Bell, Synan or its progeny. In the case at bar, plaintiff did follow the administrative process, later he had to recourse to the Board, where it was decided that plaintiff did report disclosures protected under the law, and, in NY-0752-98-0297-I-1, the Board reviewed and decided the discrimination issues. The substance in this long list of events is that all events are interrelated and are mixes issues of alleged discrimination and irregularities uttered by plaintiff. The fact that some of the causes of action were Docketed in different MSPB cases responds

only to the fact that the reprisal actions were taken at various intervals, not at the same time. Based on these facts, it is perfectly logic to conclude that plaintiff should expect all these interrelated causes of actions and allegations be reviewed and resolved by the same court. Further, if the District Court is going to resolve issues which actually are related to events wich were the continuation of prior events and is not considering those prior events, fairness and justice may be defective. This is, in NY-0752-98-0297-I-1 the Board adjudicated allegations of plaintiff insubordination and unprofessional behavior, however, those allegations were the last set of events which commenced with plaintiff's allegations of irregular activities, discrimination against employees and against auditees, provocation, fraudulent performance evaluations, proposal for suspension for purposes of threatening plaintiff and move him to drop his grievances, complaint, appeals, reports to the OSC, and other actions to coerce plaintiff to stop asking for evidence to support the irregular activities (prohibition to ask for written orders and directives, and review comments which at the same time would have set the path to entrap him). Please note that these allegations are not light issues but serious subject, and more important when we consider the fact that the OIG division of the agency is one investigative unit, including criminal investigations and that have brought many felony cases to Court. Then, consider plaintiff evidence submitted and proposed exhibits as well as the affidavits and we proposed that this case should be review in it entirety by this District Court.

The conditions reviewed at Boateng v. I.A.U. of Puerto Rico, No. 99-1295, 1999 US Dist. Lexis 18983, (D.P.R. November 12, 1999) are also disconnected from our case. Professor Boateng was denied a faculty position and he claimed defamation, conspiracy to hide facts, and age discrimination. The Court found some of his claims barred on grounds of "Res Judicata" since were first reviewed at the State Court, defamation was time-barred or not actionable when the defamation alleged was made during the judicial process; and allegations of conspiracy were not applicable against defendant who was not a government entity nor invested with a public function. In our case, defendant allegation as to untimely claims by petitioner appears without

merit as explained before, as it is the allegation of not compliance with requirements to exhaust remedies; Res Judicata is not applicable because the causes of action have not been judicially reviewed. Plaintiff's other claims are discussed in the September 1999 motion, this, incorporated herein by reference.

The agency also mentioned that plaintiff intended to bifurcate his allegations between the District Court and the Fed. Cir., this, an action impermissible per the decision in Williams v. D.O.A., 715 F.2d 1485 (Fed. Cir. 1983). We want to clarify: Plaintiff has explained, and now reaffirms, (i) plaintiff was not clear with the limitations as interpreted by various courts; please considers that plaintiff notified all the corresponding bodies the facts he has submit his case to each one. Also, (ii) in the case of the EEOC, plaintiff was specific as to indicating his desire to have all his allegations be resolve (EEO and non-EEO issues). In relation to the Fed. Cir., (iii) plaintiff responded to the defendant's June motion to dismiss all cases indicating his desire of "not to abandon" the discrimination claims, and that he was also moved to file with the Circuit because it was that Court the one which appears best qualify to resolve the "non-EEO" issues. Also, (iv) the chronology of events **together** with the high cost (plaintiff has been unemployed since February 1998) and rigorousness of litigating in a District Court were moving facts for plaintiff selection. Therefore, the message in defendant' statements is willfully misleading and improper.

U.S. MERIT SYSTEMS PROTECTION BOARD

APPELLANT'S PETITION FOR REVIEW

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U.S. MERIT SYSTEMS PROTECTION BOARD

APPELLANT'S PETITION FOR REVIEW

PLEASE COPY THE FOLLOWING FROM YOUR DECISION:

CASE NAME: Rafael Náter V. Department of Education
(Appellant Name) (Agency)

Docket No: NY-1221-96-0334-W-1

Initial or Addendum Decision Finality Date: February 23, 1998 (extension granted).

TO: The Clerk of the Board
U.S. Merit Systems Protection Board
1120 Vermont Avenue, NW, Room 806
Washington, DC 20419
FAX NUMBER: (202) 653-7130

QUESTIONS

1. Is this petition being filed on or before the decision finality date (see first page of this document under docket number)?

(Circle one.) **(YES)** NO

The Board granted an extension to file up to February 23, 1998.

Rafael Náter	(signed)	February 23, 1998
Name of Appellant	Signature of Appellant	Date
(787) 783-4671	#31 Zuania, Parque de Villa Caparra, Guaynabo. - P.R. 00966	
Telephone	Address	

CERTIFICATE OF SERVICE

I certify that a copy of this document was sent by regular mail, unless otherwise indicated below, this day to:

the Agency representative,
Tracey Sasser, Esq.
U.S. Department of Education
Office of the General Counsel
600 Independence Avenue S. W.
Room 4461
Washington, D.C. 20202

and to:
Marjorie Marks
U.S. Office of Personnel Management
Employee Relations Division
1900 "E" Street, N.W., Room 7412
Washington, D.C. 20415

Date: February 23, 1998 Signature: Rafael Náter,
Appellant. (signed)

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Rafael Náter, Petitioner v. U.S. Department of Education, Respondent

No. (993083)

Petitioner's Statement Concerning Discrimination

To this Honorable Court:

1. This case was originated before the Merit System Protection Board as a "mix" case complaint where basically I, the petitioner, alleged **discrimination based on national origin, race, and political ideas**, and **reprisal by the agency as a result of disclosures protected under the law.**

2. My petition for review before the Federal Circuit relates **only** to the claim of agency reprisal due to the protected disclosures.

3. The allegation because discrimination has been submitted for review before the Equal Employment Opportunity Commission (The Commission).

Therefore, following the facts as indicated above and the Federal Circuit rule #15(c), I understand the applicable statement concerning discrimination is:

(i) No claim of discrimination by reason of race, sex, age, national origin, or handicapped condition has been or will be made in the case; **this as far as** "... the case" refers only to the case before the Federal Circuit which exclude the Commission and **without any interference or limitation to file with a District court** after the review by the Commission, if I chose.

Respectfully submitted by, Rafael Náter, Petitioner.

Date: December 9, 1998.

Address: 31 Zuania, Parque de Villa Caparra, Guaynabo, Puerto Rico 00966

Tel: (787) 781-4089 or 783-4671